TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 291

LOUISIANA & PINE BLUFF RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED APRIL 7, 1921.

(28,216)

(28,216)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 859.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 14, 1921.

1 District Court of the United States, Western District of Arkansas, Texarkana Division.

In Equity.

No. 44.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION, IN THE ABOVE-ENTITLED CAUSE.

2 *Petition.*

Filed in U. S. District Court May 3, 1920.

In the United States District Court, Western District of Arkansas, Texarkana Division.

In Equity.

No. 44.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

Petition.

To the Honorable the Judges of said Court:

The Louisiana & Pine Bluff Railway Company, a corporation of the state of Arkansas, having its principal operating office at Huttig, in the Southern District of Arkansas, presents this its petition against the United States of America, and thereupon your petitioner complainant says:

I.

Your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, and has
3 its principal operating office as recited above, and is a common carrier by railroad engaged in interstate commerce and as such is subject to the Act to Regulate Commerce, approved Feb-

ruary 4, 1887, as amended. It owns and operates standard gauge railroad from Huttig, Arkansas, to Dollar Junction, Arkansas.

Your petitioner's line of railroad connects with the line of railroad owned by the Missouri Pacific Railway Company, successor to the St. Louis, Iron Mountain & Southern Railroad Company, at said Huttig and at said Dollar Junction, and over the line of your petitioner and the line of railroad of the said Missouri Pacific Railway Company and its connections, shipments of lumber and other forest products move in interstate traffic. Your petitioner has complied with all the requirements of the acts of Congress and of the State of Arkansas applicable to common carriers by railroad.

II.

Petitioner was party to a case before the Interstate Commerce Commission known as "Investigation and Suspension Docket No. 11, The Tap Line Case," decided April 23, 1912, and reported in Volume 23 of the Interstate Commerce Commission reports at page 277. The findings of the Commission as to your petitioner are contained on pages 583 to 587, inclusive, of said report. In said decision, the Interstate Commerce Commission found that your petitioner was not a common carrier, and by its order of May 14, 1912, in accordance with said decision, prohibited the St. Louis Iron Mountain and Southern Railway Company, and its connections,
4 from paying allowances out of the joint interstate rate on lumber and other forest products.

Said decision and order of the Interstate Commerce Commission were reversed and set aside by the Supreme Court of the United States in its decision dated May 24, 1914, in what is known as "The Tap Line Cases," 234 U. S., 1.

On July 29, 1914, the Interstate Commerce Commission handed down its opinion, upon rehearing and further argument, in conformity with the principles announced by the Supreme Court, said opinion of the Commission being reported in 31 I. C. C. 490. In said opinion making effective the decision of the Supreme Court, the Commission found that your petitioner, one of the parties to said proceeding, is a common carrier, and thereupon vacated and set aside its prior order dated May 14, 1912. The Commission found, at page 492:

"With respect to each of the tap lines that are parties to this proceeding, the original orders of the Commission, and the orders subsequently entered, so far as they relate to through routes, joint rates, and divisions, will be vacated and set aside; and upon the facts of record, we conclude and find that all the through routes and joint rates in effect prior to May 1, 1912, between the trunk lines and tap lines named on the record should be restored and reestablished, and that the divisions out of the through rate on interstate shipments of lumber and forest products, from points on such of these tap lines as file tariffs and have otherwise complied with our accounting rules, etc., should not exceed the following maximum amounts: For switching a distance of 1 mile or less from the junction $2 per car; over

1 mile and up to 3 miles from the junction $3 per car; on shipments from points over 3 miles and not more than 6 miles
5 from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds. These divisions are the net amounts that may be paid out of the trunk line rates from the junctions and when the rates from points on the tap line are made by the addition of an arbitrary, such arbitrary shall accrue to the tap line.

These divisions should be applied to all interstate shipments of lumber and forest products that moved from points on the tap lines between May 1, 1912, and the date the through rates and divisions are made effective in compliance with the order entered herein, and are a readjustment of the findings of our original report with respect to the divisions."

Instructions to the trunk lines and tap lines, including your petitioner, are contained in the following paragraph of the opinion (page 493):

"The trunk lines will be expected to file with the Commission a copy of their division sheet with each of their respective tap-line connections, making effective the divisions fixed herein. The division sheet should show the distance in miles from each station or shipping point to the junction with the issuing carrier, in addition to the amount of the division. The tap lines should file with the Commission a copy of their distance tariff or a table of distances from all shipping points on their respective lines to the junctions with the connecting carriers."

The order of the Commission was entered at a general session of the Commission at its office in Washington on July 29, 1914,
6 and contained among other provisions the following:

"It is ordered, That the orders of the Commission entered herein May 14, 1912, and October 30, 1912, and all orders entered subsequent thereto with respect to through routes, joint rates, and divisions between trunk lines and tap lines parties to this proceeding be, and the same are hereby vacated and set aside."

It is further ordered, That the principal defendants * * * St. Louis, Iron Mountain and Southern Railway Company * * * be, and they are hereby required, on or before October 1, 1914, on not less than five days' notice, to reopen through routes and publish joint rates to interstate destinations with each of the following parties to the record, with which they respectively have connections or junctions: * * * Louisiana & Pine Bluff Railway Company * * *.

Provided, That the allowances or divisions out of such joint rates to be paid by the said principal defendants respectively to the said parties to the record on lumber and forest products shall not exceed the amounts hereby fixed as maximum allowances or divisions thereon until further order, the Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations, and are unlawful.

It is further ordered, That the allowances or divisions out of the rates on interstate shipments of lumber and forest products from points on the lines of the above named parties to the record shall not exceed the following amounts, namely: For switching a distance of
7 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds.

Provided, That these divisions are the net amounts that may be paid out of the trunk line rates from the junction, and when the rates from points on the tap lines are made by the addition of an arbitrary, the amount of such arbitrary shall accrue to the tap line."

III.

In accordance with said decision and order of the Commission, dated July 29, 1914, the St. Louis, Iron Mountain and Southern Railway Company, with its connections, filed joint rates and re-established through routes for the transportation of lumber and other forest products in connection with your petitioner, from Huttig, Ark., over the line of your petitioner, through Dollar Junction, Ark., and thence over the line of the said St. Louis, Iron Mountain & Southern Railway Company, to various destinations in other states of the United States.

Your petitioner and its connections, the Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, with other railway common carriers parties to joint
8 through rates on interstate shipments of lumber and other forest products, filed division sheets making effective the allowances or divisions to your petitioner established by the said order of the Commission, dated July 29, 1914. Duly authorized representatives of the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company measured the distance over which lumber and other forest products were hauled by your petitioner from loading points at Huttig, Ark., to points of interchange at Dollar Junction, Ark., and found the same to be in excess of three miles.

The Missouri Pacific Railway Company
St. Louis, Iron Mountain & Southern Ry. Co.

AUTH'Y. No. G-5439

IN CONNECTION WITH
LOUISIANA & PINE BLUFF RY.

DIVISION BASIS No. 2244-E.
CANCELS DIVISION BASIS No. 2244-D.

TO
FREIGHT TARIFFS
OF
JOINT RATES

S.W.L. No. 48)
50)
56)-SERIES.
63)
77)

MO. PAC. No. 967)
1403)
3421)
2209)
4890)
ALSO)
1110)
1503)
3793)
4202)
4953) - SERIES.

BASIS FOR DIVIDING RATES
ON
LUMBER AND OTHER FOREST PRODUCTS, CARLOAD.

RATES DIVIDE AS FOLLOWS:-

TO	FROM	DIVISIONS IN CENTS PER 100 POUNDS. LOUISIANA & PINE BLUFF RAILWAY. T O DOLLAR JCT., ARK. YELLOW PINE AND CYPRESS	OTHER KINDS	ST. L. M. S. RY. AND CONNECTIONS BEYOND.
STATIONS IN THE FOLLOWING TARIFFS, VIZ:- 1110, 1503, 3793, 4202 AND 4953-SERIES; S.W. LINES NOS. 48, 50, 56, 63 AND 77-SERIES, MO. PAC. NOS. 967, 1403, 3421, 2209 AND 4890-SERIES.	STATIONS ON THE LOUISIANA & PINE BLUFF RAILWAY, VIZ:- HUTTIG, ARK. PLANER OF THE UNION SAW MILL CO. DISTANCE TO DOLLAR JCT., ARK., 3.23 MILES.	1.5	---	BALANCE.
	LATH HOUSE OF THE UNION SAW MILL CO. DISTANCE TO DOLLAR JCT., ARK., 3.08 MILES.	1.5	---	
	WISCONSIN LUMBER CO. PLANT DISTANCE TO DOLLAR JCT., ARK., 3.31 MILES.	---	3	

VIA
DOLLAR JUNCTION, ARK.

ISSUED NOVEMBER 24, 1914.
EFFECTIVE FROM OCTOBER 1, 1914.

(MEMO. E.H.C. 11/23/14, FILE LL-741-45, AND SECOND SUPPLEMENTAL REPORT I. & S. DOCKET No. (1.)

ISSUED BY-
W. B. KNIGHT,
CHIEF OF TARIFF BUREAU,
ST. LOUIS, MO.

We here insert a division sheet filed by the Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, No. 2244-E, duly filed with the Interstate Commerce Commission, establishing the allowance or division to your petitioner of 1½ cents on lumber and other forest products transported by your petitioner from Huttig, Ark., over the line of railroad to Dollar Junction, Ark., and there delivered to the said St. Louis, Iron Mountain & Southern Railway Company, and Missouri Pacific Railway Company, as interstate traffic.

(Here follows reproduction of division sheet, marked page 9.)

10 After a supplemental investigation by the Commission in "I. & S. Docket No. 11", the Commission handed down a further opinion, reported in Volume 40, Interstate Commerce Commission reports, page 479; in said opinion the Commission held that while the actual distance your petitioner hauled lumber and other forest products from the Union Saw Mill at Huttig to Dollar Junction exceeded three miles, a portion of the haul was to and from the track scales, where the lumber was weighed by your petitioner, and that deducting this so-called "out of line or diverted movement to a track scale" the distance the said lumber and other forest products was transported by your petitioner was less than three miles, and that therefore your petitioner was entitled only to $3 per car as an allowance or division out of the joint through rate.

Your petitioner refused to accept said amount of $3 per car and insisted upon receiving 1½ cents per hundred pounds for the haul from Huttig to Dollar Junction; thereupon the Missouri Pacific Railroad Company, successor to the St. Louis, Iron Mountain & Southern Railroad Company, filed its petition for an order to give effect to the findings announced by the Commission in said decision and report contained in 40 I. C. C. 479. Under a rule to show cause why such order should not be entered your petitioner requested the Commission to give further oral argument, which was granted. The case was re-argued before the Commission and the Commission announced its decision June 10, 1919, reported in 53 I. C. C. 475. In said decision the Commission said:

"No question is or was raised as to the correctness of the facts stated in the Commission's previous report, but it was con-
11 tended that the track scales, owing to inadequate drainage and other conditions, could not be located between the Union mill and the junction; that the out-of-line haul from the Union mill to the scale and thence to the junction with the Iron Mountain, a distance, as stated, of 3.25 miles, is actually necessary in the handling of the lumber; and that the Louisiana & Pine Bluff is entitled to compensation for services based on that distance. It is denied that any device for securing larger divisions inheres in that method of computing the distance. The track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union mill to the scales, and for part of the distance from the scales to Dollar Junction, is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

We have considered these contentions and the evidence submitted, but find no sufficient reason for modifying the findings stated in our previous report. Since that report was issued, however, the Commission has made its fifth supplemental order in The Tap Line Case increasing the divisions which may be received by tap lines from their respective trunk line connections 50 cents per car for switching three miles or less and one-half cent per 100 pounds on traffic hauled more

than three miles. These increased divisions are made effective June 1, 1919."

Thereupon the Commission entered the following order:

12

Order.

At a General Session of the Interstate Commerce Commission, Held at its Office, in Washington, D. C., on the 10th Day of June, A. D. 1919.

Investigation and Suspension Docket No. 11.

Louisiana & Pine Bluff Divisions.

This case being at issue and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its further findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It appearing, That on July 5, 1916, the Commission made its report in the above entitled proceeding, 40 I. C. C. 470, which report is also hereby referred to and made a part hereof:

It further appearing, That in said report the Commission found that the respective distances from the mill of the Union Saw Mill Company and from the mill of the Wisconsin Lumber Company at Huttig, Ark., to the connection with the Missouri Pacific Railroad at Huttig, Ark., are less than one mile; that the distance from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 3.24 miles; and that the distance from the mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 2.41 miles;

It is ordered, That the divisions accorded to the Louisiana & Pine Bluff Railway out of the rates on interstate shipments of lum-
13 ber and forest products from mills on the rails of the Louisiana & Pine Bluff Railway at Huttig, Ark., prior to June 1, 1919, shall not exceed the maximum amounts fixed by the order of July 29, 1914, in The Tap Line Case, namely: For switching from the mills of the Wisconsin Lumber Company and the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Huttig, Ark., a distance of less than one mile, $2 per car; from the mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., a distance of 2.41 miles, $3 per car; from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., a distance of 3.24 miles, 1½ cents per 100 pounds.

It is further ordered, That the increased divisions fixed in the fifth supplemental order in The Tap Line Case, effective June 1, 1919, may be applied to shipments moving on and after that date.

Provided, That the allowances and divisions fixed herein shall be applied to shipments of lumber and forest products moving between May 1, 1912, and the respective effective dates of the divisions established in compliance with this order.

And it is further ordered, That a copy of this order be served upon the Louisiana & Pine Bluff Railway Company, the Missouri Pacific Railroad Company and Georgia C. Hitchcock, special master in the matter of claims against the St. Louis, Iron Mountain & Southern Railway Company.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

14 IV.

Thereafter your petitioner filed its petition for modification of said order, which petition for modification is made a part hereof and attached hereto as Exhibit A. Petitioner alleges that the allegations contained in said petition for modification of said order are true and correct. On December 1, 1919, the Commission entered an order denying the prayer of said petition.

V.

Said Exhibit A contains a blue print or map of the lines of your petitioner and its connection at Huttig, Ark., and Dollar Junction, Ark. Your petitioner alleges that the track scales used by your petitioner in weighing carload shipments of lumber and other forest products were located and established at point E on said blue print, long prior to the institution of the investigation by the Interstate Commerce Commission in what is known as I. & S. Docket 11; that the trunk line connections of your petitioner paid allowances or divisions out of the joint through rate on interstate shipments of lumber and other forest products of 5 cents per hundred pounds, or such other sums as on the particular traffic might be agreed to by petitioner and its connections; that such divisions were paid irrespective of the exact distance such lumber was hauled; that there was no change in the location of said scales until in January, 1915, when the Western Weighing & Inspection Bureau, an organization of the various railroad in Western territory, inspected said scales, condemned them and required their removal to a point where
15 better drainage facilities and a better approach to the scales could be secured.

Lumber and other forest products of the Union Saw Mill Company at Huttig, are loaded at Point G shown on said blueprint, and are hauled by your petitioner to Point H, a distance of 855 feet, thence to the scales at Point E, a distance of 2,190 feet, where the car is weighed by a sworn weighmaster in the employ of your petitioner, and from E to F, the point of interchange at Dollar Junction, a fur-

ther distance of 14,034 feet, or an aggregate distance of 17,079 feet, or 3.25 miles.

Your petitioner performed the said service thus described on lumber and other forest products for consignors and consignees for many years prior to April 23, 1912, the date of decision of the Commission in the original Tap Line Case, 23 I. C. C. 277, and continuously thereafter until in February, 1915, when the track scales were removed, as heretofore stated, from Point E to Point C on said blue print, a distance of 484 feet, thereby requiring an additional haul over the service performed prior to such removal of 968 feet. Your petitioner since February, 1915, has performed the service of transporting lumber and other forest products from Point G to Point H, thence to Point C, thence to Point F, a total haul of 18,047 feet or 3.42 miles.

The location of the said scales originally at Point E and their removal to Point C, was in accordance with good railroad pratcice and without any intention to increase the haul of your petitioner and in no sense constituted a device to secure an increase in the al-
16 lowance or division of the joint through rate on interstate traffic. The track scales are located on the property of the Missouri Pacific Railway Company, and were located by the said Company without any suggestion from your petitioner as to the point of location.

The line of railroad track operated by the Missouri Pacific Railway Company and its predecessor, the St. Louis, Iron Mountain & Southern Railway Company, through the town of Huttig, was originally built by the Little Rock & Monroe Railway Company, the railroad of said Company extending from a connection with the Eldorado & Bastrop division of the St. Louis, Iron Mountain & Southern at Felsenthal, Ark., to Monroe, La. In the year 1905, said Little Rock and Monroe Railway Company was sold to the St. Louis, Iron Mountain & Southern Railway Company, with the right reserved to the owners of the Little Rock & Monroe Railway Company, viz: The Union Saw Mill Company, or its grantees, to operate logging trains over said line of railway and certain portions of track of the subsidiary lines of the St. Louis, Iron Mountain & Southern System. As a part of the terms of sale of said Little Rock & Monroe Railway to the St. Louis, Iron Mountain & Southern Railway Company, the former reserved to itself, to the Union Saw Mill Company or the grantees of said Union Saw Mill Company, the right to use the said lines of railroad track, approximately 1,200 feet in length, through the town of Huttig, and on said track, the said track scales above referred to were, and are, situated.

Your petitioner pays the Missouri Pacific Railway Com-
17 pany for the use by your petitioner of the rails and right-of-way, approximating 1,200 feet, owned by said Missouri Pacific Railway Company, over which your petitioner transports lumber and other forest products, all operation by your petitioner throughout the entire length of the haul from loading point to point of interchange at Dollar Junction being done by petitioner at its own expense.

Good railroad practice does not permit the interchange of carload shipments of lumber and other forest products received by your petitioner from the Union Saw Mill Company at Huttig, Arkansas, for delivery to the Missouri Pacific Railway Company; the only feasible and practicable interchange for said traffic is at said Dollar Junction.

VI.

The Iron Mountain Railway Company and its successor, the Missouri Pacific Railway Company, maintain storage tracks for interchange of traffic with your petitioner at Dollar Junction, which tracks were especially constructed for heavy and continuous movement of carload traffic of lumber and other forest products. Operating conditions and practice of the said trunk lines contemplate service of interchange from Felsenthal Yards. None of these storage tracks or these interchange facilities of the said trunk lines is available for interchange at Huttig.

The Interstate Commerce Commission on January 15, 1912, instituted an investigation into the weighing of carload freight by carriers and announced its conclusion in its decision entitled "In re weighing of Freight by Carrier," 28 I. C. C. 7, and at page 36 of said decision the Commission said:

"In our opinion every carload of freight, where track scales are relied upon to determine the weight upon which freight charges are to be assessed, should be weighed within fifty miles of the point of origin ordinarily."

As the result of the investigation in that case, the carriers, following the Commission's opinion, prepared what is known as the National Code of Rules Governing Weighing and Reweighing of Carload Freight. This code was endorsed by the Commission on June 9, 1914. Rule 3 of said code deals with "Weights—how ascertained," and Section A thereof reads as follows:

"When track scale weights are used for the assessment of freight charges, weighing must be done by or under the supervision of the carriers or their representatives, or under properly supervised weight agreements."

Rule No. 4 in part is as follows:

"Weights—where ascertained. Carload freight should be weighed at point of origin or as near thereto as practicable."

The lumber delivered by the Louisiana & Pine Bluff at Dollar Junction is picked up by the local freight train of the Iron Mountain starting from Felsenthal and is made up in trains at Felsenthal with other cars, some of the latter requiring weighing at first track scales. Most of the lumber from Huttig is moved via Collinston, Louisiana, and McGehee, Arkansas, and if not weighed at Huttig, cannot be weighed until it reaches the first track scales which are located at

said McGehee, 111 miles from Huttig. If the freight moves
19 via Gurdon, Ark., it cannot be weighed until it reaches the first track scales which are located at that point, a distance of 100 miles from Huttig. If the freight moves via Monroe, La., it might be weighed at that point, a distance of 45 miles. At Monroe, the track scales are located three-fourths of a mile north of the freight yard, and cars are handled to and from the scales by yard engines. Every car of lumber weighed at Monroe is handled approximately 1½ miles to be weighed and placed in train by yard crews. As a matter of safety and economy, it is to the advantage of the trunk line, as well as all concerned, to have the cars weighed at points of origin, guarding against overload, which might cause trouble in transit. It is also to the advantage of the trunk line to have cars weighed at point of origin in order to obtain full tonnage haul, as it is not an infrequent occurrence that the trunk line finds its general estimated train weight high, especially in shipments of finished lumber. The result of such error in estimate is that a train may move forward light.

The original record in the Tap Line Case, I. & S. 11, shows that of the 103 tap lines under investigation in that case, 20 tap lines weighed the out-bound lumber; 13 tap lines had no scales available upon which weighing could be performed; and as to the remaining 70 tap lines, the record is silent as to the existence or non-existence of track scales.

VII.

It has been the uniform practice in southwestern yellow pine territory that all tap lines subject to the original order of the
20 Interstate Commerce Commission in the Tap Line Case receive divisions in accordance with the actual distance such tap line transports lumber and other forest products as follows: Where the distance was over one mile and up to three miles, the tap line received a division of $3 per car; that on shipments from points over three miles and not more than six miles from the junction, the tap line received 1½ cents per hundred pounds; that each tap line was given the division accruing to it for its haul for even the slightest fraction of a mile, as is shown by pages 16 and 17 of Exhibit A.

By its fifth supplemental order in the Tap Line Case, dated April 7, 1919, the Interstate Commerce Commission increased the divisions or allowances established in its order of June 29, 1914, such increased allowances being effective June 1, 1919, where formerly an allowance of $3 was accorded for distances between one mile and three miles, $3.50 per car was authorized, and where the division had been 1½ cents for distances over three miles and not more than six miles, the division was increased to 2 cents per hundred pounds. These increases in divisions or allowances were made so as to permit the tap line to participate in increased joint rates prescribed by the Director General in his General Order No. 28, effective June 25, 1918, on lumber and other forest products.

VIII.

The Interstate Commerce Commission in its decision in the case of Detroit Coal Exchange v. Michigan Central, 38 I. C. C. 79, at page 84, held that the haul to and from track scales is properly to be included in the total distance for which the carrier is entitled to compensation, the Commission there saying:

"The several short operations which are necessary to take a car to and from the scale constitute one complete service, just as the several operations necessary to move a car from one industry to another constitute one complete service. The weighing operation is merely one link in the weighing movement, and is not unlike a number of individual operations incident to the average switching movement."

If its division or allowance out of the through rate be limited to $3 per car on shipments of lumber and forest products transported prior to 1919, and to $3.50 per car subsequent to said date, your petitioner's revenue will be inadequate to pay operating expenses and an actual deficit in operating income of your petitioner will result. Walker D. Hines, Director General of Railroads, operating the Missouri Pacific Railroad, the Missouri Pacific Railway Company and its predecessor, the St. Louis, Iron Mountain and Southern Railway Company, all stand ready and willing to pay to your petitioner the division or allowance of 1½ cents per hundred pounds on all shipments moving prior to June 1, 1919, and 2 cents per hundred pounds on shipments moving subsequent to said date, and but for the order complained of herein, would long ago have paid such divisions of 1½ cents and 2 cents, respectively.

Said order of the Interstate Commerce Commission dated June 10, 1919, is unlawful and void; deprives your petitioner of its property without due process of law; is unjustly discriminatory and unduly prejudicial to your petitioner, in that your petitioner is denied compensation for the service of transporting its carload traffic of lumber and other forest products to and from the track scales at Huttig, while other railroad companies are permitted by the Interstate Commerce Commission to receive compensation for similar services of transporting carload traffic of lumber and other forest products to and from track scales on their respective properties located under similar circumstances to those of your petitioner.

The Commission was without authority either in law or in fact to make the order complained of.

As an appendix to Exhibit A is a transcript of all the testimony before the said Commission on the point involved. Said transcript of testimony in no wise contains any evidence in support of the order of the Commission, but on the contrary it expressly negatives said order and requires the establishment of divisions or allowances of 1½ cents per hundred pounds on all shipments moving prior to June 1, 1919, and of 2 cents per hundred pounds thereafter.

IX.

Said order of the Interstate Commerce Commission of June 10, 1919, deprives your petitioner of its property without due process of law, is without lawful warrant and is in violation of the fifth amendment of the Constitution of the United States.

X.

Petitioner further shows that if required to comply with said order of the Commission of June 10, 1919, it will be subjected to irreparable loss and injury, without means of reparation, the difference between an allowance or division of $3 per car from May 1, 1912, and of $3.50 per car from June 1, 1919, and an allowance of 1½ cents per hundred pounds from May 1, 1912, and 2 cents from June 1, 1919, exceeds $5,000. Therefore, your petitioner alleges more than $5,000 is involved in this proceeding.

23

In consideration whereof, for as much as your petitioner is remediless in the premises at law and relievable only in a Court of Equity, your petitioners pray that a preliminary or interlocutory order or injunction be entered restraining and suspending enforcement of said order of the Interstate Commerce Commission until final determination of this cause; and that upon the final hearing herein a decree be entered enjoining, setting aside, annulling and suspending said order and enjoining, the enforcement thereof.

Your petitioner further prays that your honors will direct that a copy of this petition be forthwith served in the manner provided in acts of Congress, and your petitioner will ever pray, etc.

BARKER & BRITTON,
Boatmen's Bank Bldg.,
St. Louis, Mo.;
GAUGHAN & SIFFORD,
Camden, Ark.;
BORDERS, WALTER, BURCHMORE & COLLIN,
1623 First Nat'l Bank Bldg.,
Chicago, Illinois,
Solicitors for Petitioner.

HARRY C. BARKER,
ROY F. BRITTON,
T. J. GAUGHAN,
J. T. SIFFORD,
LUTHER M. WALTER,
JOHN S. BURCHMORE,
Of Counsel.

STATE OF ARKANSAS,
Western District of Arkansas,
Texarkana Division:

F. W. Scott, being duly sworn, deposes and says, that he is secretary and manager of the Louisiana & Pipe Bluff Railway Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

F. W. SCOTT.

Sworn to before me this 19 day of April, A. D. 1920.

E. R. FORD,
Notary Public.

[Notarial Seal.]

My commission expires Oct. 6, 1921.

24 EXHIBIT A.

Before the Interstate Commerce Commission.

I. & S. Docket, No. 11.

Louisiana & Pine Bluff Divisions.

Petition for Modification of Order.

Now comes the Louisiana & Pine Bluff Railway Company and respectfully requests the Commission to set aside its certain order entered June 10, 1919, in the above entitled proceeding and to enter in lieu thereof an order finding that the distance from the mill of the Union Sawmill Company to the connection of the Missouri Pacific Railway at Dollar Junction, Arkansas, is in excess of three miles and that the division accorded therefor be that prescribed in the original Tap Line Case for distances in excess of three miles and not over six miles, viz: 1½ cents per hundred pounds, for the period from May 1, 1912, to and including May 31, 1919, and 2 cents per hundred pounds after said date, and in support of such petition complainant respectfully shows as follows:

In the report in the above entitled proceeding, dated June 10, 1919, 53 I. C. C. 475, the Commission considered the distance over
25 which the Louisiana & Pine Bluff transported lumber from the mill of the Wisconsin Lumber Company and from the mill of the Union Saw Mill Company to Dollar Junction, where the lumber was delivered to the St. Louis, Iron Mountain & Southern Railway, and found the distance to be respectively 3.21 miles from the Wisconsin Lumber Company mill and 2.41 miles from the Union Saw Mill. The question determined by the Commission was whether the movement of the lumber from the Union Saw Mill Company to the track scale and thence to Dollar Junction, should be

included in the mileage, for which the original Tap Line Case had fixed the allowance or division to be received by the Tap Line. Notwithstanding that the decision of the Commission was upon a reargument, the Commission states:

"No question is or was raised as to the correctness of the facts stated in the Commission's previous report, but it was contended that the track scales, owing to inadequate drainage and other conditions, could not be located between the Union mill and the junction; that the out-of-line haul from the Union mill to the scale and thence to the junction with the Iron Mountain, a distance, as stated, of 3.25 miles, is actually necessary in the handling of the lumber; and that the Louisiana & Pine Bluff is entitled to compensation for services based on that distance. It is denied that any device for securing larger divisions inheres in that method of computing the distance. The track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union mill to the scales, and for part of the distance from the scales, to Dollar Junction, is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

26 We have considered these contentions and the evidence submitted, but find no sufficient reason for modifying the findings stated in our previous report. Since that report was issued, however, the Commission has made its fifth supplemental order in The Tap Line Case increasing the divisions which may be received by tap lines from their respective trunk line connections 50 cents per car for switching three miles or less and one-half cent per 100 pounds on traffic hauled more than three miles. These increased divisions are made effective June 1, 1919."

The Commission erred in its failure to modify the finding stated in the previous report and in failing to find that—

1. The service of hauling lumber from the mill to the scales, of weighing the same, and of hauling from the scales to the junction point is a service of transportation ordinarily performed by common carriers.

2. It is the duty of the Louisiana & Pine Bluff Railway under the National Code of Rules Governing Weighing of Carload Freight to weigh lumber at Huttig before delivering same to the Iron Mountain at Dollar Junction, Rule 4 of said code providing "carload freight should be weighed at point of origin or as near thereto as practicable."

3. The scales at Huttig were not located with any intent to increase the distance beyond three miles, and are in the only available place.

4. The scale of divisions prescribed by the Interstate Commerce Commission in the Tap Line Case was designed for general application throughout the yellow pine producing territory and has been universally applied in that territory. The decision of the
27 Commission herein, unless modified as herein prayed for, will operate as an unjust discrimination against the Louisiana & Pine Bluff Railway.

I.

The service of hauling lumber from the mill to the scales, of weighing the same, and of hauling from the scales to the junction point is a service of transportation ordinarily performed by common carriers.

In a long series of cases this Commission has recognized that the movement of cars to scales, the weighing thereon, the movement thence, is a part of transportation. This question was squarely raised in Detroit Coal Exchange et al, v. Michigan Central et al., 38 I. C. C. 79. The question involved the lawfulness of rules and charges governing the weighing and re-weighing of carload freight in Detroit, Michigan. After a full hearing the rules and charges complained of were held to be unreasonable and unduly preferential. The Commission said (page 80):

"The jurisdiction of this Commission to pass upon the weighing charge is challenged. The weighing service, although performed after the initial physical delivery of the car, is nevertheless an incident of the transportation service, especially as the weight secured is used in the computation of freight charges and in the settlement of claims for shortage. When the transportation is interstate some of its incidents, such as receipt, delivery, storage, demurrage, car service and weighing, assume an interstate character. As the act to regulate commerce applies to 'all services in connection with the receipt, delivery, * * * and handling of property trans-
28 ported,' our conclusion is that we have jurisdiction of the weighing service. Wilson Produce Co. v. Pa. R. R. Co., 14 I. C. C. 170, 173; C. R. I. & P. Ry. Co. v. Hardwick Elevator Company, 226 U. S. 426; New England Coal & Coke Co. v. N. & W. Ry. Co., 22 I. C. C. 398.

It is also suggested that where the actual delivery of the car is made by a switching carrier no duty rests upon that carrier to re-weigh the car upon request. This contention is also answered by section 1 of the act which, in connection with the instrumentalities and services comprehended in the term 'transportation,' makes it the duty of every carrier subject to the act 'to provide such transportation upon reasonable request therefor.' If a switching carrier participates in the through movement of a car, a re-weighing of the car is included in the transportation which it is its duty to perform upon reasonable request."

In the case of In re Weighing of Freight by Carrier, 28 I. C. C. 7, the Commission conducted a very extensive inquiry into the manner of weighing freight, reliability of scales, etc.; a complete survey was made of all services in ascertaining a basis of weight upon which charges should be computed.

In a number of cases the Commission has exercised jurisdiction and awarded reparation. Some of the cases squarely cover the question of whether the weights should have been taken at point of origin or destination. See Northern Mercantile Co. v. A. E. Railroad Co., 42 I. C. C. 290; Ewing & Co. v. Oregon Short Line et al., 46 I. C. C. 471.

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II.

It is the duty of the Louisiana & Pine Bluff Railway under the national code of rules governing weighing of carload freight to weigh lumber at Huttig before delivering same to the Iron Mountain at Dollar Junction, rule 4 of said code providing "carload freight should be weighed at point of origin or as near thereto as practicable."

In the case of In re Weighing of Freight by Carrier, 28 I. C. C. 7, at page 36, the Commission said:

"In our opinion every carload of freight, where track scales are relied upon to determine the weight upon which freight charges are to be assessed, should be weighed within fifty miles of the point of origin ordinarily."

As the result of the investigation in that case the carriers, following the Commission's opinion, prepared what is known as the National Code of Rules Governing Weighing and Re-Weighing of Carload Freight. This code was endorsed by this Commission on June 9, 1914. Rule 3 of said code deals with "Weights—how ascertained," and Section A thereof reads as follows:

"When track scale weights are used for the assessment of freight charges, weighing must be done by or under the supervision of the carriers or their representatives, or under properly supervised weight agreements."

Rule No. 4 in part is as follows:

"Weights—where ascertained. Carload freight should be weighed at point of origin or as near thereto as practicable."

30 The lumber delivered by the Louisiana & Pine Bluff at Dollar Junction is picked up by the local freight train of the Iron Mountain starting from Felsenthal and is made up in trains at Felsenthal with other cars, some of the latter requiring weighing at first track scales. Most of the lumber from Huttig is moved via Collinston, Louisiana, and McGehee, Arkansas, and if not weighed

at Huttig cannot be weighed until it reaches the first track scales which are located at McGehee, 111 miles from Huttig. If the freight moves via Gurdon, it cannot be weighed until it reaches the first track scales which are located at that point, a distance of 100 miles. If the freight moves via Monroe, Louisiana, it might be weighed at that point, a distanct of 45 miles. At Monroe the track scales are located three-fourths of a mile north of the freight yard and cars are handled to and from the scales by yard engines. Every car of lumber weighed at Monroe is handled approximately 1½ miles to be weighed and placed in train by yard crews. As a matter of safety, it is to the advantage of the trunk line, as well as all concerned, to have the cars weighed at point of origin, guarding against overload, which might cause trouble in transit. It is also to the advantage of the trunk line to have cars weighed in order to obtain full tonnage haul, as it is not an infrequent occurrence that the trunk line finds its general estimated train weight high, especially in shipments of finished lumber. The result of such error in estimate is that a train moves forward light.

The original record in the Tap Line Case, I. & S. 11, shows that of the 103 tap lines under investigaton in that case 20 tap
31 lines weighed the out-bound lumber, 13 tap lines had no scales available upon which weighing could be performed; and as to 70 tap lines the record is silent as to the existence or non-existence of track scales.

The extent of the service performed by the 20 tap lines doing the weighing is not stated in the record, except in the case of the Louisiana & Pine Bluff, and that was developed on the re-hearing. The following tap lines performed weighing services (page reference is to record before the Commission):

Blytheville, Leachville & Arkansas Southern R. R. (track scales at Glenco, also sworn weighmaster). (4058.)

De Queen & Eastern Railroad (has track scales on which northbound cars are weighed). (2837.)

El Dorado & Wesson Railway (has 100-ton track scale at Wesson 4503). (Cars are weighed there—4504.)

Fourche River Valley & Indian Territory Ry. (Lumber Company owns track scales which are used by the railroad—2334).

Warren & Ouachita Valley Ry.—track scale at Warren (665).

Gulf & Sabine River R. R. Co.—100-ton track scale (6438-9).

Louisiana & Pacific R. R.—track scales at De Ridder, Bon Ami and Fulton (1665). (Road is member Western Weighing Ass'n. (1666).

Mansfield Railway & Transportation Co.—100-ton 40 ft. track scale at Oak Hill (5095).

Ouachita & Northwestern R. R.—track scales at Clarks and Standard (1497).

32 Sabine & Northern—track scales at Deweyville owned jointly by transportation company and K. C. S. and operated by Sabine & Northern under lease (2968).

Tremont & Gulf—3 track scales (Exhibit 1, page 722).

Victoria Fisher & Western—track scales at Fisher (3904).

Caro Northern—track scales at Wydeck (3172). Tap line weighs cars (3171).

Groveton Lufkin & Northern—has track scales (2194).

Nacogdoches & Southeastern—100-ton 40 ft. track scale at Hayward (5473).

Texas Southeastern—has track scales (2661).

Natchez, Columbia & Mobile—track scales at Norfield. Out-bound lumber weighed by tap line (3230-1).

New Orleans, Natalbany & Natchez—has track scales (3386).

Salem, Winona & Southern—track scales at West Eminence (2518-2522).

Deering Southwestern—track scale at Deering (re-hearing page 48e).

In the case of Northern Mercantile Co. v. Arizona Eastern, 42 I. C. C. 290, complainant attacked the practice of the defendant of exacting charges on cedar posts and poles on point of origin weights. The complaint was dismissed, the Commission saying (293):

"Defendants' present rules provide that weights of com-
33 modities subject to shrinkage in weight from their inherent nature properly obtained at or near point of origin should not be changed, but that if obvious error is discovered each case should be dealt with upon its individual merits and a full report made to the originating carrier. As to other commodities, the rules provide that where the check weight shows a difference of 500 pounds or more, such weight shall govern. Cedar posts and poles are usually exposed to rain and snow after they are cut and before they are shipped and after long hauls such as are here involved will weigh considerably less at destination than at point of origin. Some are shipped greener than others and shrink in weight more rapidly, the shrinkage frequently amounting to 1,000 pounds or more per carload in a haul of 1,000 miles. The rules and practices of defendants as to weighing and re-weighing are in consonance with National Code of Rules Governing Weighing and Re-weighing of Carload Freight and with the views expressed by the Commission — In re Weighing of Freight by Carriers, 28 I. C. C. 7."

A similar question arose in the case of Ewing & Co. v. Oregon Short Line, 46 I. C. C. 471. The Commission dismissed the complaint, saying (472):

"We have previously approved the assessing of charges on articles subject to shrinkage in transit on basis of origin weights. On June 9, 1914, we indorsed the National Code of Rules Governing Weighing and Re-Weighing of Carload Freight, and recommended its application to interstate transportation throughout the country. A rule of that code provides:

'Weights of commodities subject to shrinkage in weights from their inherent nature, properly obtained at or near point of origin, should not be changed, except as provided for in the tariffs of the carriers. If obvious error is discovered, each case should be dealt

with upon its individual merits, and report made to the originating carrier with all the facts.'

34 On January 15, 1916, a similar rule was incorporated into the tariff carrying the rate applicable to this shipment, and is still in effect.

The rule of the Orgeon Short Line under attack was canceled July 23, 1915, since which date the weighing rules of that company have conformed to the National Code of Rules, supra."

This Commission has already held that the Louisiana & Pine Bluff Railway is a carrier subject to the Act to Regulate Commerce. The record discloses that it performed the service of weighing its outbound carload freight long before the Tap Line Case was initiated and that it has constantly performed that service. In so doing it is in exact accord with the decisions of the Commission above referred to and with the National Code of weighing rules applicable throughout the United States.

III.

The Scales at Huttig were not located with any intent to increase the distance beyond three miles, and are in the only available space.

The old scales were located at point E on blueprint attached, 2,190 feet from the switching point, for many years (St. Louis testimony of February 3, 1916, page 26), but were condemned by the Western Weighing and Inspection Bureau January 10, 1915, and the new scales were completed some time during the latter part of February or first of March of that year. (Rec., 50.)

The new scales were moved 484 feet farther south, the new location being selected by the Iron Mountain so as to secure better drainage facilities (page 26).

35 The appendix hereto gives excerpts from the testimony of various witnesses so far as the same referred to the location of the scales and the service performed by the Louisiana & Pine Bluff Railway.

A blue-print showing the location of the scales and tracks at Huttig is attached to each of twelve copies of this petition. It will be observed that the distance the lumber is actually and necessarily hauled from the loading point to the scales, and thence to Dollar Junction, exceeds three miles and that the change of location of the scales from the old point to the new only increased the distance from 3.24 miles to 3.40 miles. There is, therefore, no possible basis for any contention that the Louisiana & Pine Bluff moved the scales in order to make the service which it performed exceed three miles and thereby secure a larger division.

IV.

The scale of divisions prescribed by the Interstate Commerce Commission in the tap line case was designed for general application throughout the yellow pine producing territory and has been universally applied in that territory, the decision of the Commission herein, unless modified as herein prayed for, will operate as an unjust discrimination against the Louisiana & Pine Bluff Railway.

The scale prescribed by the Commission in I. & S. No. 11 followed the decision of the Supreme Court reversing the action of the Commission and was applied, as the terms of its order of July 29, 1914, expressly provide, "to the said parties to the record on lumber and forest products." The order provided that the
36 divisions set forth "are the net amounts that may be paid out of the trunk line rates from the junction." These divisions have been applied by the Commission in subsequent decisions. They have been incorporated in the division sheets which have been filed with this Commission, both by tap line and by trunk line.

It has been the uniform practice of all of the tap lines subject to order in I. & S. 11 to receive a division in accordance with the actual distance; wherever the distance was "over one mile and up to three miles from the junction, $3 per car; on shipments from points over three miles and not more than six miles from the junction, 1½ cents per hundred pounds," etc.; the tap line was given the increase for even the slightest fraction of a mile. The following table gives some of the divisions for slight distances over the scale breaking points paid to the tap lines performing the service of weighing:

37 The following tap lines have scales, as shown in the testimony before the Interstate Commerce Commission in the tap line case, I. & S. 11.

(Figures immediately following name of carrier refer to page of transcript showing scale.)

	Distance.	Division.	Point of origin.	Trunk-line connection.
Blytheville, Leachville & Arkansas Southern (4058)	1.17	$3.50	Chickasawba	Frisco
Blytheville, Leachville & Arkansas Southern (4058)	20.77	3½c.	Caraway	Frisco-Cotton Belt
DeQueen & Eastern (2837)				
Eldorado & Wesson (4503)	7.	2c.*	Geneva	Kansas City Southern
Fourche River Valley & Indian Territory	10.19	3c.	Wesson	Rock Island
(2334)	11.	3c.	Orchard	Rock Island
Caro Northern (3172)	3.5	1½c.*	Winder	Texas & New Orleans
Deering Southwestern (rehearing 48-E)	1.5	$3.50	Hornersville Jct.	St. Louis Southwestern
Deering Southwestern (rehearing 48-E)	20.4	3½c.	Braggadocia	Cotton Belt
Groveton, Lufkin & Northern (2194)	10.1	2½c.*	Blix	(Houston E. & W.— (St. L. S. W.
Groveton, Lufkin & Northern (2194)	6.1	2½c.	Lucy	M. K. & T.
Groveton, Lufkin & Northern (2194)	1.3	$3.50	G.L.&T. Jct.	M. K. & T.
Gulf & Sabine River (6438)	6.4	2c*	Fullerton	Lake Charles & Nor.
Louisiana & Pacific (1665)	1.1	$3.50	Bridge Jct.	Missouri Pacific
Louisiana & Pacific (1665)	3.3	2c.	Newton	Missouri Pacific
Louisiana & Pacific (1665)	6.1	2½c.	Belfield	Missouri Pacific
Louisiana & Pacific (1665)	20.2	3½c.	Ragley	Missouri Pacific
Louisiana & Pacific (1665)	30.2	4c.	Sweetville	Missouri Pacific
Louisiana & Pacific (1665)	40.3	4½c.	Bon Ami	Missouri Pacific

Louisiana & Pacific (1665)	1.2	$3.50	Hudson River Lbr. Co. sawmill	Guf, Colo. & S. F.
Louisiana & Pacific (1665)	40.1	4½c.	Ararat	Guf, Colo. & S. F.
Mansfield Ry. & Trans. Co. (5095)	1.11	$3.00*	Oakhill	Kansas City Southern
Mansfield Ry. & Trans. Co. (5095)	10.25	2½c.*	Burgess	Kansas City Southern
Mansfield Ry. & Trans. Co. (5095)	6.9	2½c.	Baker	Texas Pacific
Mansfield Ry. & Trans. Co. (5095)	10.4	3c.	Mooreville	Texas Pacific
Nacagdoches & Southeastern (5473)	6.9	2c.*	Hamptons	Texas & New Orleans
Natchez, Columbia & Mobile (3230)	3.5	1½c.*	Wilkinson	Illinois Central
Ouachita & Northwestern (1497)	1.6	$3.50	Clarks	Missouri Pacific
Ouachita & Northwestern (1497)	10.13	3c.	Standard	Missouri Pacific
Texas Southeastern (2661)	10.5	3c.	Blix	St. Louis Southwestern
Texas Southeastern (2661)	6.3	2½c.	Peavy	St. Louis Southwestern
Texas Southeastern (2661)	10.3	2½c.*	Vair	Houston E. & W. Texas via Diboll
Warren & Ouachita Valley (605)	1.5	$3.50	Cloquet	Missouri Pacific

*NOTE.—Divisions prior to Fifth Supplemental Order I. & S. No. 11.

38 The following table gives some of the divisions for slight distances over the scale-breaking points to some of the tap lines that do not perform the service of weighing.

	Distance.	Division.	Point of origin.	Trunk line connection.
Angelina & Neches River	20.5	3½c.	Etoile	St. Louis Southwestern
Angelina & Neches River	30.2	4c.	Chireno	St. Louis Southwestern
Brookings & Peach Orchard	3⅛	2c.	Brookings	Missouri Pacific
Butler County Railroad	6.15	2½c.	Pollard	St. Louis Southwestern
Central Ry. of Arkansas	6.1	2½c.	Plainview	C. R. I. & P.
Central Ry. of Arkansas	10.8	3c.	Fourche Jct.	Rock Island
Fordyce & Princeton	6.7	2½c.	Cynthiana	Rock Island
Gideon & North Island	3.37	2c.	O'Neil	Missouri Pacific
Gideon & North Island	20.81	3½c.	North Island	Missouri Pacific
Jefferson & Northwestern	10.3	3c.	Pruitt	Texas Pacific
Jefferson & Northwestern	1.2	$3.50	No. Jefferson	Texas Pacific
L'Anguille River Railway	1.15	$3.50	Deutsch	Missouri Pacific
Little Rock, Maumelle & Western	10.5	3c.	Carnes	Missouri Pacific
Neame Carson & Southern	3.38	1½c.*	C. C. Jct.	Kansas City Southern
Red River & Gulf	10.42	3c.	Bliss	Mo. Pac. via Longleaf
Red River & Gulf	30.12	4c.	Lewiston	Mo. Pac. via Le Compte
Woodworth & Louisiana Central	6.2	2½c.	Lamoiree	Missouri Pacific
Woodworth & Louisiana Central	6.33	2½c.	Woodworth	Texas & Pacific

*NOTE.—Division prior to Fifth Supplemental order I. & S. No. 11.

39 The divisions shown are those accorded by the Commission in its Fifth Supplemental order in the Tap Line Case except where otherwise indicated by the note attached to each of the foregoing tables.

These 27 tap lines, it will be observed, are accorded increases in divisions for even distances so short as 1-10 of a mile. These figures are taken from the records of the Commission. It must be manifest to the Commission that a gross injustice will result to the Louisiana & Pine Bluff if it is denied full allowance or division for the service which it actually performs, and if it is not accorded the division which the tap line order permits it to have, while at the same time all of the other tap lines above mentioned and others, are permitted to have the division for the full distance they haul their lumber.

We believe the Commission, in its consideration of this case, failed to examine into the state of the record in this respect and failed to give weight to the facts herein referred to. The annual reports of the Louisiana & Pine Bluff to this Commission show that the division herein asked for will not give it a fair return upon its investment. The United States court is now holding a fund with which to pay the divisions upon the basis we are herein asking. No part of that division has been paid from May 1, 1912, down to this date.

That the length of the haul to and from the scales is properly to be included in the total distance cannot be denied. This Commission said in the case of Detroit Coal Exchange v. Michigan Central, 18 I. C. C. 79, at page 84:

"The several short operations which are necessary to take
40 & 41 a car to and from the scale constitute one complete service, just as the several operations necessary to move a car from one industry to another constitute one complete service. The weighing operation is merely one link in the weighing movement, and is not unlike a number of individual operations incident to the average switching movement."

For the reasons herein stated petitioner prays that the order herein complained of be set aside and that an order be issued by the Commission finding that the service performed by the Louisiana & Pine Bluff herein described is for a distance in excess of three miles and that the trunk line carriers may pay an allowance therefor for the period from May 1, 1912, to June 1, 1919, of 1½ cents and after said date a division of 2 cents.

Respectfully submitted,

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42 *Appendix.*

St. Louis, Mo., May 5, 1914.

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Mr. Bodine: The lumber would be on the track the switch of which is at Point E. It would come out over the track to Point D and from there over the joint track, the track that is used jointly to Point B, and over the main line of the Iron Mountain to Point A, which is the switch of the interchange.

Mr. Snow: And after the cars are set at that point which you have last mentioned, the Louisiana & Pine Bluff Railway

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has no further connection with the movement.

Mr. Bodine: No. I will modify that by saying they very often weigh the cars on that same track.

St. Louis, Mo., February 7, 1916.

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Mr. Thomas: * * * Now, on this map I wish to call the Examiner's attention, as also Mr. Sanford's, to the distance from A to B. In taking a car of lumber from the Wisconsin Lumber Company, it would move 1,563 feet between those points.

From B down to C, a car would move 1,185 feet.

From C to D, a car would move 750 feet.

From D back to E, the scales is 420 feet, and from E, the scales, through to Dollar Junction, is 14,034 feet, making a total of 17,952 feet, or 3.40 miles.

43 Page 21.

Mr. Thomas: The plant of the Union Saw Mill Company * * * would move from G to H, a distance of 855 feet.

From H back to E, the scales, is 2,190 feet.

The distance from E to F, through to Dollar Junction, is

Page 22.

14,034, making the total distance of 17,079 feet, or 3.25 miles.

Page 25.

Mr. Thomas: It was made on the 11th day of September, 1915. He went over the same route that I did, except that the scales had been moved over there, and of course he took the extra dimensions to

the present location of the scales. Other than that, he followed my route the same as the Iron Mountain engineer did.

* * * * * * *

Mr. Britton: Now, Mr. Thomas, do you know whether or not there has been any change in the scales since you made your measurements?

Page 26.

Mr. Thomas: Yes, sir; the scales have been moved south, on the same track, a distance of 904 feet from the point indicated by D.

Mr. Britton: Do you know why the scales were moved?

Mr. Thomas: Those were new scales put in there on account of the other scales being old, having been in there for years, and having been condemned by the Western Weighing & Inspection Bureau.

Mr. Britton: Why were not the new scales put in at the old location?

Mr. Thomas: Due to the contour of the track, and to gain better drainage facilities. There is a big, deep ditch that parallels that track all the way through. That track, as you will notice, is 1,457 feet.

Mr. Britton: Do you know whether or not your company had anything to do with the location of those scales?

Mr. Thomas: Nothing that I know of.

Mr. Britton: So that the distances actually moved by these cars are even greater than that shown on this exhibit?

Mr. Thomas: Yes, sir; it would be 484 feet farther south than my figure, or in the total movement it would be just twice that, or 968 feet more to be added to both sets of figures.

Page 28.

Mr. Britton: Mr. Thomas, will you tell the Examiner why the out-bound shipments are weighed at Huttig?

Mr. Thomas: Mr. Examiner, no doubt you appreciate the fact that our line, being a common carrier, we do our own billing of this traffic, and do all our work in regard to in-bound traffic, as prescribed by the Interstate Commerce Commission in their order dated June 1, 1914, wherein they adopted the National code of rules governing weighing and reweighing of carload freight.

They say, in Rule 3:

"Weights—How Ascertained."

Section A of that rule reads as follows:

"When track scale weights are used for the assessment of freight charges, weighing must be done by or under the supervision of the carriers, or their representatives, or

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under properly supervised weight agreements."

Rule Number 4 of this same issue, has regard to:

"Weights—where ascertained. Carload freight should be weighed at point of origin, or as near thereto as practicable."

These same rules are also embodied in Missouri Pacific-Iron Mountain Circular Number 262-A, the language being almost identical.

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Mr. Thomas: There are no tracks at Huttig that could be used as interchange tracks for traffic handled between ourselves and the Iron Mountain. There is the track on which the scales are located, measuring 1,457 feet, which must be kept open for the weighing both of in and out-bound freight, and also used sometimes in the passing of trains.

Page 33.

Mr. Britton: Then, the only track that could possibly be available for the interchange of traffic at Huttig is the scale track, or the track on which the scale is located?

Page 34.

Mr. Thomas: That would be the only one, although it is not the logical one, for the simple reason that we have to keep the
46 tracks open to weigh not only our out-bound but our in-bound, and the Iron Mountain also.

Page 50.

Examiner Hagerty: Who owns the scale? Is that Iron Mountain?

Mr. Thomas: Iron Mountain owns it, except it is joint; the weighmaster is under the supervision of the Western Weighing & Inspection Bureau. He reports to the New Orleans office of that Bureau.

Examiner Hagerty: When was the new scale put in there? What date?

Mr. Thomas: It was completed— it was condemned, if my memory served me right, on January 10, 1915, and it was completed, I think, some time the latter part of February, or the following month.

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Examiner Hagerty: I will ask again a question in reference to the computing of the distance, why the movement to and from the scales is included?

Mr. Thomas: Well, Mr. Examiner, you understand that we do all of the billing, handle all of the records there at Huttig, both inbound and outbound, except such traffic as is handled in or over the rails of the Iron Mountain direct, and in billing this lumber, you appreciate the fact that we are complying with the order of the Interstate Commerce Commission in regard to weighing the cars at the first scale point, and that being at the point of origin, after securing those weights, scale weights, from the agent of the Western Weighing & Inspection Bureau.

47 Page 58.

our agent makes out his way-bills, billing the cars through to destination, or to the river crossings upon which the rates are based, showing the correct rate, as also the extension of the freight charges, and routing the cars through to final destination, regardless of billed destination, and for that reason we are compelled to weigh those cars at Huttig. We perform that service with our own trains, with our own crews, and the agent of the Western Weighing & Inspection Bureau handles the scale. It is absolutely compulsory.

Examiner Hagerty: Well, I do not know whether that answers the question as to why you used the distance to and from the scale in computing the distance.

Page 82.

Mr. Scott: * * * Our engine, in order to go to Dollar Junction, is headed south. It backs in this track at the Point H, and picks up its train of lumber, pulls it out on the main line and pushes the train back into the scale track indicated as D, where the cars are passed over the scales and weighed, and then it proceeds on north to Dollar Junction.

Page 83.

Mr. Britton: It moves from H to the scales, the loads are weighed there and it continues right on to Dollar Junction?

Mr. Scott: Yes, sir.

Page 93.

Examiner Hagerty: Now, can you tell us something about the location of the mill? Why it was put in the place it now is,
48 and why you included the distance to and from the scale in

Page 94.

computing the length of the haul of your railroad?

Mr. Britton: Just a moment, the Examiner understands that the distance which we show on this blue print was the distance to the former location of the scales?

Examiner Hagerty: Yes.

Mr. Britton: We have not taken account, in these distances, of the movement of the scales.

Examiner Hagerty: No; but you have taken into account the distance to the old scales?

Mr. Britton: Yes; we have referred to it, and we have made our blue print on the theory that the scales were located where they were before the change was made?

Examiner Hagerty: Yes.

Mr. Scott: The location of the scales was determined according to the conditions there that would give them proper drainage. The location of the blue print is where the scales were located for several years, but they had difficulty in keeping the water out of them, as there is a kind of a low point there, so when the new scales were put in they were moved back south of the location shown on the blue print. It is a higher point, and they can get the proper drainage. That is the explanation of the movement of the scales, or why the position was changed.

49 Page 95.

Examiner Hagerty: The Iron Mountain put in the scales?

Mr. Scott: Yes, sir, without——

Examiner Hagerty: Did the Iron Mountain choose the location?

Mr. Scott: Yes, sir; we knew nothing about where they were going to put them until the work was commenced there.

Eaminer Hagerty: Would it not have been practical to put that scale anywhere else along the line of travel between Huttig and Dollar Junction?

Mr. Scott: It would be impracticable at any other point. We have not any—these other tracks have to be kept open for the movement of trains.

Examiner Hagerty: They could not be put at Dollar Junction where the interchange track is?

Mr. Scott: The scales could be put there, yes, sir; but we have not been in position—with no revenue coming in, we have not been in position to put in tracks or scales either, at other points where we already have the facilities.

Eaminer Hagerty: Now, you have explained quite comprehensively what the Iron Mountain did not get in that sale, etc.

Page 105.

Mr. Scott: The logs delivered by the Iron Mountain usually are set in on the scale track where they are weighed, and left there.

Examiner Hagerty: It would be proper to say, then, that the scale track is the point of delivery of the logs?

50 Mr. Scott: That is the usual point, yes, sir. If that track happens to be blocked or occupied with other loads, etc.

Page 111.

Mr. Britton: Now, you were asked about placing the scales at Dollar Junction. If that was done all of the traffic interchange at Dollar Junction could use those scales, couldn't it?

Mr. Scott: Well——

Mr. Britton: They would not be available for Iron Mountain use for traffic at Huttig?

Mr. Scott: No, sir.

Mr. Britton: And would a weigh master have to be kept there if——

Mr. Scott: A weigh master would have to be retained at Dollar Junction, and also at Huttig.

Page 112.

Examiner Hagerty: Which would be the more expensive to maintain, another scale and weigh master at Dollar Junction, or continue the movement of cars back and forth to the scale the way you do now?

Mr. Scott: Well, the way it is handled at the present is the practical operation, the way it has been done all the time.

Examiner Hagerty: Well, I say, which would be the more expensive method, to install another scale at Dollar Junction, or to continue under the present practice of handling the cars back and forth this additional distance to reach the scale?

Mr. Scott: It would be more expensive to install scales at Dollar Junction.

51 Examiner Hagerty: You think it would?

Mr. Scott: Yes, sir.

Mr. Britton: These scales are maintained under the supervision of the association, are they not?

Mr. Scott: Maintained under the supervision of the Western Weighing Association?

(Here follows blue-print marked page 52.)

53 *Answer of Interstate Commerce Commission.*

Filed in U. S. District Court May 29, 1920.

In the District Court of the United States, Western District of Arkansas, Texarkana Division.

In Equity.

No. 14.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent, and INTERSTATE COMMERCE COMMISSION, Intervening Respondent.

Answer of Interstate Commerce Commission.

The Interstate Commerce Commission, one of the parties respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

This respondent, which for convenience will be referred to hereinafter as the Commission, admits that the allegations contained in paragraphs I to III, inclusive, of the petition are true.

The Commission alleges that it made and entered the order
54 dated June 10, 1919, set forth in paragraph III of the petition, in a proceeding then pending before it, known as I. & S. Docket No. 11, wherein petitioner was a party.

The Commission further alleges that said proceeding was instituted and prosecuted for the purpose, among other things, of determining the questions of whether the divisions of through rates for the transportation of interstate traffic, paid to petitioner by the St. Louis, Iron Mountain & Southern Railway Company, the Missouri Pacific Railway Company, and other common carriers, subject to the interstate commerce act, were unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, within the meaning of, and in violation of, said act; that in connection with said questions the full hearing provided for in section 15 of said act was accorded to petitioner; that at said hearing a large volume of testimony and other evidence bearing upon said questions was submitted to the Commission for consideration on behalf of petitioner and others by counsel; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, said questions were fully argued, and the matters involved in said proceeding were submitted to the Commission for determination on behalf of petitioner, by its counsel,

whereupon the Commission determined said questions and made a report, stating the Commission's decision, conclusions, and requirement in the premises, and also made an order based thereon; that said report and order were duly served upon petitioner; and
55 that in and by said report the Commission said:

In our original report in this proceeding, 40 I. C. C., 470, dealing with the question of divisions to the Louisiana & Pine Bluff Railway, it was found that the distance from the Union mill at Huttig, Ark., one of the plants served by the tap line, to the connection with the St. Louis, Iron Mountain & Southern Railway, hereinafter called the Iron Mountain, at Dollar Junction was 2.41 miles. Including an out-of-line movement from the Union mill to the track scale, the distance was 3.25 miles, but the Commission held that an out-of-line or diverted movement to a track scale may not, under the second supplemental report in The Tap Line case, 31 I. C. C., 490, be included in computing the distance upon which the division that a tap line may receive is to be determined.

It was further found that the maximum division which the tap line might properly receive for services performed, as fixed in the report last above cited, should not be more than $3 per car for the movement from the Union mill to Dollar Junction. This amount being within the maxima fixed in the order of July 29, 1914, entered in connection with the second ssupplemental report, no further order was deemed necessary. The Louisiana & Pine Bluff, however, refused to accept this amount of $3 per car for switching from the Union mill to Dollar Junction or to make settlement on that
56 basis for services that had been rendered during the pendency of this proceeding. Thereupon, the Missouri Pacific Railroad, successor to the Iron Mountain, filed its petition for an order to give effect to our findings. Under a rule to show cause why such order should not be entered the Louisiana & Pine Bluff petitioned for further oral argument, which was granted and the case was reargued before the Commission.

No question is or was raised as to the correctness of the facts stated in the Commission's previous report, but it was contended that the track scales, owing to inadequate drainage and other conditions, could not be located between the Union mill and the junction; that the out-of-line haul from the Union mill to the scale and thence to the junction with the Iron Mountain, a distance, as stated, of 3.25 miles, is actually necessary in the handling of the lumber; and that the Louisiana & Pine Bluff is entitled to compensation for services based on that distance. It is denied that any device for securing larger divisions inheres in that method of computing the distance. The track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union mill to the scales, and for part of the distance from the scales, to Dollar Junction, is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

57 We have considered these contentions and the evidence submitted, but find no sufficient reason for modifying the findings stated in our previous report. Since that report was issued, however, the Commission has made its fifth supplemental order in The Tap Line case increasing the divisions which may be received by tap lines from their respective trunk line connections 50 cents per car for switching three miles or less and one-half cent per 100 pounds on traffic hauled more than three miles. These increased divisions are made effective June 1, 1919.

We adhere to our original finding in this proceeding, with the modification that the divisions accorded the Louisiana & Pine Bluff for switching interstate shipments of lumber and forest products from the Union mill at Huttig, Ark., to Dollar Junction, should not exceed $3 per car up to and including May 31, 1919, and $3.50 per car on and after June 1, 1919.

An appropriate order will be entered.

The Commission further alleges that in said proceeding, namely, I. & S. Docket No. 11, it held several hearings and made several reports as shown by the allegations contained in the petition in this suit; that at first it found the maximum reasonable division to be paid to petitioner, out of the aforesaid through rates, by the St. Louis, Iron Mountain & Southern Railway Company, the Missouri Pacific Railway Company, and other common carriers, for the transportation services here in question to be performed by petitioner,

58 to be $3 per carload, and that in the report mentioned in the above quotation, referred to by it as its "original report," the Commission found that the payment of any division, greater than $3 per carload, to petitioner for said services would be unduly preferential to petitioner and unduly prejudicial against common carriers other than petitioner who perform similar services. In this connection the Commission said:

In our second supplemental report in The Tap Line Case, 31 I. C. C., 490, we revised the views announced in the original proceeding, thus conforming our own course in these matters to the rulings of the Supreme Court in The Tap Line Cases, 234 U. S., 1; and after a very careful study of the question we there fixed switching allowances and divisions for general application in this southwestern territory. For a haul of 3 miles or less under our order in that proceeding, which order is still in force throughout the territory, a tap line may receive a maximum allowance of $3 a car. And this is the amount which the Iron Mountain has been paying to the Pine Bluff on lumber traffic from both mills at Huttig interchanged at Dollar Junction. The Pine Bluff, however, is here asserting that its haul to that junction is in excess of 3 miles, and that under our order in the case last cited it is therefore entitled not to a switching charge of $3 a car but to a division out of the through rate of 1½ cents per 100

59 pounds, or approximately $9 a car. It is important, therefore, that the distance from the two mills to Dollar Junction be accurately determined, and that, indeed, was one of the chief purposes in asking for a rehearing.

The measurements, which have been taken with care, show that

the mileage actually traversed by the cars when moving between the mill of the Wisconsin company and the trunk line connection at Dollar Junction is 3.40 miles; and that between the Union plant and the same connection a car moves 3.25 miles. The mere statement of these distances, however, is not sufficient, especially in view of the facts in this case. It is shown of record that these distances include out of line or diverted movements to the track scales of 840 feet, in the case of shipments of the Wisconsin company, and of 4,380 feet, in the case of shipments from the Union mill. If these distances be deducted from the total haul the actual necessary mileage covered by the cars in direct movement to Dollar Junction is 3.24 miles from the Wisconsin mill and 2.41 miles from the Union mill. In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an out of line haul to the scale track of nearly a mile. Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for
60 divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction. Under the circumstances we can not lend our sanction to the demand for increased allowances to be paid to the Pine Bluff from the Union mill.

The Commission further alleges that subsequent to the date of said original report it found, upon additional evidence submitted to it in that connection, as above shown, that said division of $3 per carload might reasonably be increased to $3.50 per carload.

The Commission further alleges that said findings were, and are, and that each of them was, and is, fully supported and justified by the evidence submitted to the Commission at the hearings in said proceeding.

The Commission further alleges, that in making its reports and orders herein mentioned, it considered exhaustively and weighed carefully in the light of its own knowledge and experience every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the allegations of the petition herein.

The Commission further alleges that said division of $3.50 per carload will furnish to petitioner full, reasonable, fair, and just compensation for the aforesaid services to be performed by petitioner and covered by said division, and denies each of, and all, the allegations to the contrary contained in said petition.

61 The Commisison further alleges that said order of June 10, 1919, was not made or entered by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of, and all, the allegations to the contrary contained in said petition.

The Commission further alleges that the findings of fact made by it as aforesaid, and upon which said order of June 10, 1919, was and is based, were the result of its consideration of all the evidence referred to in paragraph 8 of the petition herein, and a very large volume of other evidence, submitted to it at the different hearings in the aforesaid proceding, namely, I. & S. Docket No. 11, for consideration in determining, among other things, said questions, involved in this suit.

The Commisison further alleges that statements made by it in its decision in the case of Detroit Coal Exchange v. Michigan Central Railroad Company, referred to in paragraph 8 of the petition herein, have no relation to, or bearing upon, the questions before the court for determination in this suit, for the reason, among other reasons, that the transportation charges involved in said case pertain to the reweighing of shipments at points of destination.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the peti-
62 tion herein, in so far as they conflict either with the allegations in this answer, or with either the statements or conclusions of fact included in the Commission's said reports and orders, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this Honorable Court shall direct, and thereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
By P. J. FARRELL,
W. R. McFARLAND,
Counsel.

CITY OF WASHINGTON,
District of Columbia, ss:

Joseph B. Eastman, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

JOSEPH B. EASTMAN.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 24th day of May, 1920.

[SEAL.] ALFRED HOLMEAD,
[Notarial Seal.] *Notary Public.*

My commission expires July 10, 1924.

63 *Motion to Dismiss and Answer of the United States.*

Filed in U. S. District Court, May 31, 1920.

In Equity.

No. 44.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, Petitioner,

v.

UNITED STATES OF AMERICA.

Motion of the United States to Dismiss the Petition.

United States of America, defendant, by its counsel, now comes and moves the court to dismiss the petition at the cost of petitioner. As grounds for this motion it is shown—

1. It does not appear from the face of the petition that the facts found by the Commission in its reports and orders do not support the order sought to be enjoined and suspended.

2. It appears from the face of the petition that the facts found by the Commission in its reports and orders in all respects support the order sought to be enjoined and suspended.

3. The petition seeks to put in issue, for hearing before and by the court, matters and things exclusively within the jurisdiction of the Commission, and beyond the jurisdiction of the court, to hear and determine.

4. The petition does not show that the Commission erroneously decided any question of law, that it proceeded irregularly, or that any constitutional or other right has been or will be invaded by its order.

5. The petition is without equity on its face and does not
64 state any cause of action against the United States.

Wherefore, defendant prays that its motion be sustained and that the petition be dismissed at the cost of petitioner.

Answer of the United States.

United States of America, defendant, by its counsel, now comes and for answer to the petition filed herein against it, says:

I. It has no knowledge of the matters and things alleged in Paragraph I, and it neither admits nor denies the same, and in so far as they become material on the hearing it will require strict proof thereof.

II. It admits petitioner was a party to Investigation & Suspension Docket No. 11, decided April 23, 1912; that findings were

made with respect to petitioner and are officially reported in XXIII Interstate Commerce Commission Reports 277, and Supplemental Report at page 549; and more particularly at pages 583 to 587 of the latter. Because of their length, defendant does not attach a copy of the report and supplemental report but the contents thereof are well known to petitioner, and defendant prays that the reports and each and every part of the same may be read and taken and considered as a part hereof as fully and completely as if wholly incorporated herein.

Petitioner was not a party to The Tap Line Case, 234 U. S. Reports, page 1, or to any case in any court which framed issues over any matter or thing decided by or involved in Investigation & Suspension Docket No. 11. The various decisions made in that case were based on issues made by companies whose geographical
65 location and facts and circumstances were vastly different from those of petitioner and did not directly affect petitioner.

It admits the Commission made and filed its Second Supplemental Report in I. & S. Docket No. 11, decided July 29, 1914, officially reported in XXXI Interstate Commerce Commission Reports, 490. The Commission made no specific finding or reference in the last mentioned report to petitioner. Because of its length, defendant does not attach a copy of the official report, but its contents are well known to petitioner, and defendant prays that the second supplemental report and each and every part of the same may be read and taken and considered as a part hereof as fully and completely as if wholly incorporated herein.

Subject to verification for possible error, defendant admits that the order in pursuance of the Second Supplemental Report was entered on July 29, 1914, as stated.

III. It has no knowledge of the matters and things alleged in Paragraph III on pages six, seven and eight of the petition, and neither admits nor denies the same, and in so far as they become material on the hearing it will require strict proof thereof.

Defendant alleges that on April 27, 1915, the Commission made and filed its Third Supplemental Report in I & S. Docket No. 11, officially reported in XXXIV Interstate Commerce Commission Reports, 116, with respect to the subject matter in controversy. Because of its length defendant does not attach a copy of the official report, but its contents are well known to petitioner, and defendant prays that the said report and each and every part of
66 the same may be read and taken and considered as a part hereof as fully and completely as if wholly incorporated herein.

It admits the Commission made and filed a further report in Louisiana & Pine Bluff Divisions (I. &. S. Docket No. 11), decided July 5, 1916, officially reported in XL Interstate Commerce Commission Reports, 470. Because of its length defendant does not attach a copy of the official report, but its contents are well known to petitioner, and defendant prays that the said report and each and every part of the same may be read and taken and considered as a part hereof as fully and completely as if wholly incorporated herein.

It admits the Commission made and filed its Supplemental Report in Louisiana & Pine Bluff Divisions (I. & S. Docket No. 11), decided June 10, 1919, officially reported in LIII Interstate Commerce Commission Reports, 475. Because of its length defendant does not attach a copy of the supplemental report, but its contents are well known to petitioner, and defendant prays that the said supplemental report and each and every part of the same be read and taken and considered as a part hereof as fully and completely as if wholly incorporated herein.

Subject to verification for possible error, defendant admits that the order in pursuance of the supplemental report of June 10, 1919, and of the previous report of July 5, 1916, was entered on June 10, 1919, as stated.

As to the allegations that petitioner refused to accept $3 per car and insisted upon receiving 1½ cents per 100 pounds for the haul from Huttig to Dollar Junction, and the filing of the petition by the Missouri Pacific Railroad Company for an order to give effect
67 to the findings announced by the Commission in its report and order in XL Interstate Commerce Commission Reports, 470, and as to further oral argument before the Commission, defendant has no knowledge with respect to those matters and things, and it neither admits nor denies the same, and in so far as they become material upon the hearing it will require strict proof thereof.

IV. It has no knowledge of the matters and things alleged in Paragraph IV, and it neither admits nor denies the same, and in so far as they become material on the hearing it will require strict proof thereof.

V. It has no knowledge that the blue print or map attached to the petition and marked "Exhibit A" is a true and correct blue print or map of the matters and things which it purports to represent, and it neither admits nor denies the same, and in so far as it becomes material on the hearing defendant will require strict proof thereof. It has no knowledge of the matters and things further alleged in Paragraph V, and it neither admits nor denies the same, and if they become material on the hearing it will require strict proof thereof, with this exception: that in so far as the facts alleged in Paragraph V coincide with the facts found by the Interstate Commerce Commission in its reports and orders, the defendant admits the same.

VI. It has no knowledge of the matters and things alleged in Paragraph VI, and it neither admits nor denies the same, and in so far as they become material on the hearing it will require strict proof thereof, with this exception: that in so far as the facts alleged in Paragraph VI coincide with the facts found by the Interstate Commerce Commission in its reports and orders, the defendant admits the same.

68 VII. It has no knowledge of the matters and things alleged in Paragraph VII, and neither admits nor denies the same, and in so far as they become material on the hearing it will require strict proof thereof, with this exception: that in so far as the facts

alleged in Paragraph VII coincide with the facts found by the Interstate Commerce Commission in its reports and orders, the defendant admits the same.

VIII. It denies that the appendix to Exhibit A attached to the petition is a complete transcript of all the testimony before the Interstate Commerce Commission on the point involved, which is obviously, on its face, not such a complete transcript. Defendant denies that the complete testimony before the Commission, or that the appendix to Exhibit A, in no wise contains any evidence in support of the order of the Commission.

Defendant denies that the decision in Detroit Coal Exchange v. Michigan Central, XXXVIII Interstate Commerce Commission Reports, 79, 84, in any wise supports the case of the petitioner; defendant alleges that if said report becomes material on the hearing, that the entire report, and not mere excerpts or extracts therefrom, should be taken and considered.

IX-X. The allegations of Paragraphs IX and X, and each and every part of the same, are denied.

Further answering the said petition, and each and every part of the same, in so far as it has not heretofore been admitted, denied or otherwise traversed, defendant denies—

(*a*) Any fact or facts alleged in said petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Interstate Commerce Commission in its reports and orders.

69 (*b*) Any fact or facts alleged in said petition, or any part of the same, which are inconsistent with any fact or facts found by the Interstate Commerce Commission in its reports and orders.

(*c*) Any and all inferences of fact from any particular fact or facts alleged in the said petition, or any part of the same, which seek to deny, or which are inconsistent with, any fact or facts found by the Interstate Commerce Commission in its reports and orders.

(*d*) Any fact or facts alleged in said petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Interstate Commerce Commission.

(*e*) Any fact or facts alleged in said petition, or any part of the same, which attack or which seek to attack the reports and orders of the Interstate Commerce Commission, and to show facts other than what the said reports and orders show on the face thereof.

(*f*) Any allegations in said petition, or any part of the same, which allege that facts were found by the Interstate Commerce Commission in its said reports and orders which, as shown on the face thereof, in fact were not so found.

(*g*) Any conclusions of law alleged and insisted upon in the said petition, or any part of the same, which are inconsistent with any

conclusions of law held by the Interstate Commerce Commission in its said reports and orders.

(*h*) Each and every allegation in the said petition contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that
70 the petition be dismissed at the cost of the petitioners, and for such other and further orders as may be appropriate.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
EMON O. MAHONY,
United States Attorney,
Western District of Arkansas.

71 *Decree.*

Entered in U. S. District Court March 4, 1921.

In Equity.

No. 44.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Respondent.

This cause came on for hearing before the Hon. Kimbrough Stone, Circuit Judge, and Hon. Jacob Trieber and Hon. Frank A. Youmans, District Judges, and by consent of parties the hearing was to be for final decree; whereupon it was ordered, adjudged and decreed that the Bill of Complaint be dismissed for want of equity at plaintiff's costs.

And thereupon the plaintiff prays an appeal to the Supreme Court and having filed its assignment of errors, the appeal is granted, returnable in thirty days, upon execution by the plaintiff of a cost bond in the sum of $500.00 to be approved by a Judge or the clerk of this court.

KIMBROUGH STONE,
U. S. Circuit Judge.
JACOB TRIEBER,
U. S. District Judge.
FRANK A. YOUMANS,
U. S. District Judge.

72 *Assignment of Errors.*

Filed in U. S. District Court March 4, 1921.

In Equity.

No. 44.

Louisiana & Pine Bluff Railway Company, Petitioner,

vs.

United States of America, Respondent.

Assignment of Errors.

Louisiana & Pine Bluff Railway Company, petitioner, now comes by its counsel and files the following assignment of errors on which it will rely on appeal to the Supreme Court of the United States from the order or decree of the District Court dismissing the petition entered March 4, 1921, in the above entitled cause:

The District Court erred:

I.

In dismissing the bill.

II.

In finding and deciding that the basis of the decision by the Interstate Commerce Commission in the order and decision complained of in the bill herein, was "that it had not been shown that it was necessary for the tap line rather than the trunk line to take this weight".

III.

In finding and deciding that the Commission interpreted and applied its order of July 29, 1914, 40 I. C. C., 470, which established the basis of tap line charges "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point".

73 IV.

In finding and deciding that the District Court cannot review the finding of the Commission, 53 I. C. C., 475, "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line".

V.

In finding no error of fact in the findings of the commission complained of in the petition, nor any misapplication of law thereon.

Wherefore, petitioner prays that the decree of the District Court entered March 4, 1921, dismissing the bill, be reversed, annulled and set aside with directions to enter a decree enjoining the order of the Commission, as prayed in the petition, and for such other and further order as may be appropriate.

BARKER & BRITTON,
Boatmen's Bank Bldg., St. Louis, Mo.;
GAUGHAN & SIFFORD,
Camden, Arkansas;
BORDERS, WALTER, BURCHMORE & COLLIN,
1623 First National Bank Bldg.,
Chicago, Illinois.
Solicitors for Petitioner.

HARRY C. BARKER,
ROY F. BRITTON,
T. J. GAUGHAN,
J. T. SIFFORD,
LUTHER M. WALTER,
JOHN S. BURCHMORE,
Of Counsel.

74 *Cost Bond on Appeal.*

Filed in U. S. District Court March 4, 1921.

44, Eq.

Know all men by these presents,

That we, Louisiana & Pine Bluff Ry. Co. as principal, and Milton Winham as surety, are held and firmly bound unto United States of America in the full and just sum of $500.00 to be paid to the said United States; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this 4th day of March in the year of our Lord one thousand nine hundred and 21.

Whereas, lately at the Special Term, A. D. 1921, of the District Court of the United States for the Western District of Arkansas, in a suit depending in said court between Louisiana & Pine Bluff Ry. Co. plaintiff and United States defendant decree was rendered against the said plaintiff and the said plaintiff has obtained appeal of the said court to reverse the said decree in the aforesaid suit, and admonishing defendant to be and appear in the United States Supreme Court 30 days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said plaintiff shall prosecute said appeal to effect, and answer all costs if

it fail to make good its plea, then the above obligation to be
75 void, else to remain in full force and virtue.

Sealed and delivered in presence of
LOUISIANA & PINE BLUFF RY. CO., [SEAL.]
By LUTHER M. WALTER, [SEAL.]
MILTON WINHAM, [SEAL.]

Approved by
FRANK A. YOUMANS,
Judge.

76 *Memorandum Opinion.*

Filed in U. S. District Court March 4, 1921.

In Equity.

No. 44.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

Memorandum Opinion.

Per Curiam:

On July 29, 1914, the Interstate Commerce Commission entered an order making allowances to tap lines such as this plaintiff. So far as here material, those allowances were $3.00 per car for distances between 1 and 3 miles from loading to junction point and 1½ cents per 100 pounds for distances from 3 to 6 miles. Cars loaded with lumber at the platforms of the Union Saw Mill Company if hauled directly to the junction point at Dollar Junction travel slightly less than three miles but if taken by way of a track scale, located in the opposite direction from the junction, they travel 3.25 miles. The scales are located on the track of and controlled by the trunk line but the tap line has contractual rights to use that portion of the trunk line. In a decision and order of the Commission entered June 10, 1919, it was determined that the plaintiff could not include the distance of the scale haul and was entitled only to the charge of $3.00 based upon a haul of less than 3 miles. The basis of this decision was that it had not been shown that it was necessary for the tap line rather than the trunk line to take this weight. After denial by the Commission of a petition to modify this order, this complaint was filed to enjoin the enforcement of the above order of June 10, 1919.

Issues have been joined by answer and the United States has
77 filed a motion to dismiss. By consent of parties the matter has been heard on final submission upon the pleadings and a

subsequent supplemental order of the Commission introduced in evidence. This latter order is not regarded as affecting the issues.

The Commission (40 I. C. C., 470) interpreted and applied its order of July 29, 1914, which established the basis of tap line charges, as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point. It there said (italics ours):

"In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an *out of line haul* to the scale track of nearly a mile. Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those *fixed by the Commission for the distance covered by a direct movement from the mill to the junction.*"

We accept this interpretation, by the Commission, of the meaning of its own order not only because the order itself is clearly susceptible of such interpretation but because of the evil results (as set out in the above quotation) which might follow any other conclusion. As to the importance and imminence of such results we are inclined to respect the fears of the Commission for, as said by the Supreme Court in O'Keefe v. U. S. 240 U. S. 294, 303, "a tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others." Taking this as the meaning of this order we turn to its application to this action. The Commission has found in
78 this case (53 I. C. C. 475) that "The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line." We cannot review this finding as we have only a portion of the evidence before us. Therefore, we find no error of fact in the findings of the Commission here involved nor any misapplication of law.

Therefore, the bill should be, and is, dismissed.

79 *Certificate.*

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing pages hereto attached numbered 1 to 78, inclusive, to be and constitute a true copy of the record and of the assignment of errors and of all proceedings in the case of Louisiana & Pine Bluff Railway Company vs. United States of America, as the same respectively appear on file and of record in my office as such clerk in the Texarkana Division of said District.

This transcript is transmitted in return of the appeal of the Louisiana & Pine Bluff Railway Company to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said court at office in the City of Fort Smith, Arkansas, this March 30, 1921.

[Seal of the District Court, Western District of Arkansas, U. S. A.]

WM. S. WELLSHEAR,
Clerk.

80 In the Supreme Court of the United States.

No. 859.

Louisiana & Pine Bluff Railway Company, Appellant,

v.

The United States of America and Interstate Commerce Commission, Appellees.

Stipulation.

It is hereby stipulated by counsel of record for the parties in the above-entitled proceeding that the Clerk of the Supreme Court of the United States shall cause to be printed as a part of the record in the above entitled proceeding the Sixth Supplemental Order of the Interstate Commerce Commission in The Tap Line Case, Investigation and Suspension Docket No. 11, made by said Commission on September 8, 1920, a copy of which is attached hereto.

LUTHER M. WALTER,
For Louisiana & Pine Bluff Railway Company.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General, for the United States.
W. R. McFARLAND,
For the Interstate Commerce Commission

Washington, D. C., April 12, 1921.

81 Interstate Commerce Commission.

Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of Sixth Supplemental Order of the Commission, entered September 8, 1920, in Investigation and Suspension Docket No. 11, the Tap Line Case, the original of which is now on file and of record in the office of this Commission.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Commission this 11th day of April, A. D. 1921.

[Seal of the Interstate Commerce Commission.]

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

82 *Sixth Supplemental Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 8th Day of September, A. D. 1920.

Investigation and Suspension Docket No. 11.

The Tap Line Case.

In the Matter of the Investigation and Suspension of Schedules Canceling Through Rates with Certain Tap Line Connections and Certain Other Cases Consolidated Herewith.

It appearing, That by the fifth supplemental order entered herein on April 7, 1919, the Commission fixed the maxima of allowances or divisions out of the rates on interstate shipments of lumber and forest products that may be received by the tap lines parties to this proceeding;

It further appearing, That in its report in Increased Rates, 1920, 58 I. C. C., 220, the Commission authorized certain increases of rates, and charges of railroads within the continental United States, and found that where carriers earn specific amounts as their compensation out of through rates or fares, such amounts should be increased in the same percentages as the through rates or fares;

It is ordered, That from and after the effective date of the increased rates authorized by the report of the Commission in Increased Rates, 1920, supra, the switching charges or divisions which may be paid to tap lines parties hereto by the trunk lines out of the rates on interstate shipments of lumber and forest products from points on said tap lines to the various groups defined in said report shall not exceed the following amounts, namely:

For switching a distance of one mile or less from the junction, $3.30 per car; over one mile and up to three miles from
83 the junction, $4.50 per car; on shipments from points over three miles and not over 10 miles from the junction, 3 cents per 100 pounds; over 10 miles and not over 20 miles from the junction, 4 cents per 100 pounds; over 20 miles and not more than 40 miles from the junction, 5 cents per 100 pounds; over 40 miles from the junction, 6 cents per 100 pounds.

Provided, That these divisions are to be the net amounts that may be paid out of the trunk line rates from the junction, and when the rates from points on the tap lines are made by the addition of

an arbitrary, the amount of such arbitrary shall accrue to the tap line.

It is further ordered, That the respective defendants herein shall file with the Commission on or before December 1, 1920, copies of their division sheets with each of their respective tap line connections, making effective the divisions authorized herein, which division sheets shall show the distances in miles from each station or shipping point to the junction with the issuing carrier, in addition to the amount of the divisions.

It is further ordered, That the fifth supplemental order entered herein on April 7, 1919, be, and the same is hereby, set aside.

It is further ordered, That this order, except the preceding paragraph, shall continue in force until the further order of the Commission.

By the Commission.

GEORGE B. McGINTY,
Secretary.

[SEAL.]

84 [Endorsed:] File No. 28,216. Supreme Court U. S. October Term, 1920. Term No. 859. Louisiana & Pine Bluff Ry. Co., appellant, vs. The United States et al. Stipulation and addition to record. Filed April 11, 1921.

Endorsed on cover: File No. 28,216. W. Arkansas D. C. U. S. Term No. 859. Louisiana & Pine Bluff Railway Company, appellant, vs. The United States of America. Filed April 7th, 1921. File No. 28,216.

No. 291

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

LOUISIANA & PINE BLUFF RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES OF AMERICA.
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

MOTION TO ADVANCE.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1920.

LOUISIANA & PINE BLUFF RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES OF AMERICA.
Appellee.
No. 859.

Appeal from the District Court of the United States for the Western District of Arkansas.

MOTION TO ADVANCE.

Comes now the appellant, by its counsel, and respectfully moves the court to advance this case for argument on an early day of the next term of this court, and in support of said motion shows:

This is a suit by the Louisiana & Pine Bluff Railway Company to set aside an order of the Interstate Commerce Commission, dated June 10, 1919, in a proceeding before that Commission entitled Investigation and Suspension Docket No. 11, Louisiana & Pine Bluff Divisions, 53 I. C. C. 475.

In Investigation and Suspension Docket No. 11, commonly known as the Tap-line case, following the decision of this court, 234 U. S. 1, the Commission fixed a mileage scale of allowances or divisions to be paid by the trunk

lines to the various tap lines; for switching a car a distance of over one mile and up to three miles from the junction the allowance was $3 per car and for distances over three miles and not over six miles from the junction the allowance was 1½ cents per hundred pounds. See 31 I. C. C. 490.

In the case of the Louisiana & Pine Bluff Railway, the Commission held that the distance to and from the track scales should not be included in determining the mileage the cars are hauled by the appellant and thereby reduced the allowance to be paid to the appellant by the St. Louis, Iron Mountain & Southern Railway Company from 1½ cents per hundred pounds of lumber to the basis of $3 per car, as the exclusion of the haul to and from the scales, where the car was weighed to determine the basis of transportation charges to be paid by the shipper or consignee, reduced the distance to less than three miles.

The District Court held that the Interstate Commerce Commission in making the order complained of did not exceed its power and therefore declined to set the order aside. Whether the Interstate Commerce Commission had the right to exclude the distance appellant hauls lumber to and from the scales is the question involved in this case. Its determination is of importance not only to the applicant, but to all other carriers who may be similarly situated.

By Act of October 22, 1913, precedence and expedition in hearing is provided for.

Respectfully submitted,

LUTHER M. WALTER,
Counsel for Appellant.

1623 First National Bank Bldg.,
Chicago, Illinois.
April 25, 1921.

No. 291

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

LOUISIANA & PINE BLUFF RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Western District of Arkansas.

BRIEF FOR APPELLANT.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Solicitors for Appellant.

September 17, 1921.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1921.

No. 291.

LOUISIANA & PINE BLUFF RAILWAY COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Western District of Arkansas.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a decree of the District Court of the United States for the Western District of Arkansas, dismissing the bill of complaint for want of equity. The bill of complaint was brought to set aside and annul an order of the Interstate Commerce Commission dated June 10, 1919, fixing the compensation of appellant for transporting carloads of lumber from the mill of the Union Sawmill Company at Huttig, Arkansas, to the connection between the appellant and the Missouri Pacific Railway at Dollar Junction, Arkansas, at $3.00 per car.

The case, broadly speaking, involves the right of the Commission, in fixing distance rates and divisions of rates on lumber, to exclude the distance the car is hauled by the appellant to and from track scales. If the distance to and from the track scales is included, the total haul by the appellant exceeds three miles and under the scale of tap line divisions, fixed by the Commission, appellant was entitled to 1½ cents per hundred pounds. If the distance to and from the scales is properly excluded, the scale rate of $3.00 per car was properly applied.

The District Court, in a memorandum opinion (Rec., 44), dismissing the bill, interpreted and applied the Commission's decision and order as contemplating a direct haul from the loading point to the junction point "without any diversion not made necessary to safely and properly reach such junction point," and declined to review the finding of the Commission that "the evidence does not show that it is necessary that the shipments be weighed by the tap-line rather than by the trunk line."

By the decision in *The Tap Line Case*, 23 I. C. C. 277, to which appellant was a party, the Interstate Commerce Commission held that the appellant was not a common carrier, and by its order of May 14, 1912, prohibited the St. Louis, Iron Mountain & Southern Railway Company and its connections from paying allowances to appellant out of the joint interstate rates on lumber and other forest products. The decision and order of the Commission in *The Tap Line Case* was reversed and set aside by this court in its decision of May 24, 1914, (*The Tap Line Cases*, 234 U. S. 1.) On July 29, 1914, the Commission handed down its opinion upon rehearing and further argument, 31 I. C. C. 490, finding that appellant is a common carrier and vacating and setting aside its prior order of May 14, 1912. The Commission found, with reference to each of the tap-lines parties to the proceeding that joint

rates should be restored and re-established and that divisions should not exceed the following maximum amounts: for switching a distance of one mile or less from the junction, $2 per car; over one mile and up to three miles from the junction, $3 per car; on shipments from points over three miles, and not more than six miles from the junction, 1½ cents per hundred pounds. Increased divisions were allowed for increased mileages. The Commission then provided in its order that the divisions allowed were the net amounts that may be paid out of the trunk line rates from the junction and should be applied to all interstate shipments of lumber and forest products moving from points on the tap lines between May 1, 1912, to the date the through rates and divisions were made effective.

The Commission, in its report, required the trunk lines to file with the Commission a copy of their division sheets with each of the tap lines, showing the distance in miles from each station or shipping point to the junction with the issuing carrier. The tap lines were required to file a copy of their distance tariff or table of distances from all shipping points on their respective lines to the junctions with the connecting carriers.

In accordance with said decision and order of the Commission, the St. Louis, Iron Mountain & Southern Railway Company filed joint rates and re-established through routes for the transportation of lumber and other forest products from points on the line of the appellant at Huttig, Arkansas, over appellant's line, through Dollar Junction, Arkansas, and thence over the line of the St. Louis, Iron Mountain & Southern Railway Company to various destinations in other states of the United States, and filed division sheets making effective the allowances or divisions to the appellant established by the said order of the Commission on July 29, 1914. Representatives of the

Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company measured the distance over which lumber and other forest products were hauled by the appellant from loading points at Huttig and Dollar Junction, Arkansas, and found the same to be in excess of three miles. A division sheet in accordance therewith is reproduced. (Rec., 8.)

After supplemental investigation in I. & S. Docket No. 11 the Commission handed down an order and opinion, 40 I. C. C., 470, holding that while the actual distance appellant hauled lumber and other forest products from the Union Sawmill at Huttig, to Dollar Junction, exceeded three miles, a portion of the haul was to and from the track scales, where the lumber was weighed by the appellant, and that deducting this so-called "out-of-line or diverted movement to a track scale," the distance said lumber and other forest products was transported by the appellant was less than three miles and therefor appellant was entitled only to $3 per car as an allowance or division out of the joint through rate. Appellant refused to accept said $3 per car and insisted upon receiving 1½ cents per hundred pounds for the haul from Huttig to Dollar Junction. Thereupon the Missouri Pacific Railroad Company, successor to the St. Louis, Iron Mountain & Southern Railroad Company, filed its petition with the Commission for an order to give effect to the findings announced by the Commission in said decision and report, 40 I. C. C., 470.

Under a rule to show cause why such order should not be entered, appellant requested the Commission to give further oral argument, which was granted. Upon reargument, the Commission announced its decision June 10, 1919, 53 I. C. C. 475. The Commission referred to the contentions that the haul from the Union Sawmill to the scale, and thence to the junction with the Iron Mountain,

a distance of 3.25 miles, was actually necessary in the handling of the lumber, and that the Louisiana & Pine Bluff was entitled to compensation for services based on the entire distance, and found "The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line." (Rec., 6.) The Commission further stated that it could find no sufficient reason for modifying the findings stated in its previous report. It did, however, in line with increased rates, permit an increase of 50 cents per car for switching three miles or less, and one-half cent per hundred pounds on traffic hauled more than three miles.

The Commission thereupon entered its order of June 10, 1919 (Rec., 7), finding the distance from the mill of the Union Sawmill Company to the Missouri Pacific at Dollar Junction is 2.41 miles.

Thereafter appellant filed its petition for modification of such order (Exhibit A to the bill of complaint) (Rec., 14). On December 1, 1919, the Commission denied the prayer of said petition. Thereupon, petition was filed in the District Court of the United States for the Western District of Arkansas, to set aside and annul the said order of June 10, 1919.

By consent of the parties the case was heard on final submission upon the pleadings before Honorable Kimbrough Stone, Circuit Judge, and Honorable Jacob Trieber and Honorable Frank A. Youmans, district judges, sitting as a district court.

The question presented by this case is whether the Interstate Commerce Commission lawfully may deny appellant compensation for the necessary haul of a carload of lumber to and from the track scales.

ASSIGNMENTS OF ERROR.

The District Court erred:

I. In dismissing the bill.

II. In finding and deciding that the basis of the decision by the Interstate Commerce Commission in the order and decision complained of in the bill herein, was "that it had not been shown that it was necessary for the tap line rather than the trunk line to take this weight."

III. In finding and deciding that the Commission interpreted and applied its order of July 29, 1914, 40 I. C. C., 470, which established the basis of tap line charges "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point."

IV. In finding and deciding that the District Court cannot review the finding of the Commission, 53 I. C. C., 475, "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line."

V. In finding no error of fact in the findings of the commission complained of in the petition, nor any misapplication of law thereon.

ARGUMENT.

The District Court erred:

I. In dismissing the bill.

II. In finding and deciding that the basis of the decision by the Interstate Commerce Commission in the order and decision complained of in the bill herein, was "that it had not been shown that it was necessary for the tap line rather than the trunk line to take this weight."

IV. In finding and deciding that the District Court cannot review the finding of the Commission, 53 I. C. C., 475, "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line."

In the opinion of the Commission (Rec., 6), it will be observed the foregoing finding that "the evidence does not show it is necessary that the shipments be weighed by the tap line rather than by the trunk line," is merely a statement of the conclusion by the Commission that there is an absence of evidence as to which railroad should weigh the lumber, whether the Louisiana & Pine Bluff or the Missouri Pacific Railroad Company. The testimony before the Commission discloses that the Louisiana & Pine Bluff, the appellant, for years had weighed lumber at the track scale at Huttig; that this practice had been in effect since long before the institution of the Tap Line Case; that the scales had been located at Huttig at the most convenient place, and that during all the period prior to the rendition of the first decision by the Commission in the Tap Line case appellant had received for its services out of the joint through rate, an allowance of 5 cents per hundred pounds. There is, therefore, complete evi-

dence upon which to find that the manner in which appellant performed its services in no way constitued a device by which to secure an excessive portion of the joint through rate. The interest which owned the Union Sawmill Company had constructed a line of railroad 44 miles long, known as the Little Rock & Monroe Railway, extending from a connection with the Iron Mountain at Felsenthal to Monroe, passing through Huttig. Immediately after the completion of this line of railway in 1905, it was sold to the Iron Mountain, with the right reserved to the proprietary interest to operate its trains over the tracks so conveyed to the Iron Mountain, 23 I. C. C., 584. The scales used by appellant are located on the rails sold to the Iron Mountain and over which the proprietary interests had reserved the right to operate.

In January or February, 1915, new scales were established, because the old ones had been condemned by the Western Weighing & Inspection Bureau, on account of the faulty darinage facilities. The Missouri Pacific Railway Company fixed the new location of the scales 484 feet farther south than the former location (Rec., 27). Exhibit A to the bill of complaint contains a map of the track and shipping points, showing the location of the old scales and of the new scales. A car loaded at the plant of the Union Sawmill Company would move from point "G" to "H," a distance of 855 feet, and after passing the switch points would be moved to "E," where the scales were formerly located, a distance of 2190 feet, and after being weighed would be moved from "E" north to "F," 14,034 feet, a total distance of 17,079 feet, or 3.25 miles. The additional distance to the present location of the scales is 484 feet, and with a return movement of like distance, the total haul from "G" to "F" through the present location of the scales is 18,047 feet, or 3.42 miles.

Shipments of lumber from the Wisconsin Lumber Company's plant, loaded at point "A," would move from "A" to "B" to "C" to "D" to "E" to "F," a total distance of 17,952 feet, or 3.4 miles, and for this haul the Commission allowed a division of 1½ cents per hundred pounds; the distance from "D" to "E" and return, of 840 feet, if subtracted from the total haul, still leaves an ample margin over the three miles.

No contention is made, or can be made, that the location of the scales at point "E," or at their present location, was designed to increase the haul to the appellant, or in any way to constitute a device to secure an increase division. The average carload of lumber weighs from 48,000 to 50,000 pounds per car. The difference between $3 per car and 1½ cents per hundred pounds, thus appears to be from $4.20 to $4.50 per car.

In January, 1912, the Interstate Commerce Commission on its own motion instituted an investigation into the weighing of carload freight by carriers, and announced its conclusion. *In re Weighing of Freight by Carrier*, 28 I. C. C., 7. After a careful investigation into the facts and circumstances connected with the weighing of carload freight, the Commission reached a conclusion which will be found at page 36 of said decision:

> "In our opinion every carload of freight, where track scales are relied upon to determine the weight upon which freight charges are to be assessed, should be weighed within 50 miles of the point of origin ordinarily."

Following that decision of the Commission, the carrier prepared what is known as the National Code of Rules Governing Weighing and Re-Weighing of Carload Freight, which code was endorsed by the Commission on June 9, 1914. Rule 3 of said code deals with "Weights—how ascertained," and section "A" of said rule is as follows:

"When track scale weights are used for the assessment of freight charges, weighing must be done by or under the supervision of the carriers or their representatives, or under properly supervised weight agreements."

Rule No. 4 in part is as follows:

"Weights—where ascertained. Carload freight should be weighed at point of origin or as near thereto as practicable."

The only track scales at Huttig, Arkansas, are those which are used by appellant in the weighing of lumber, as outlined heretofore. Lumber delivered by the appellant to the Missouri Pacific Railroad company at Dollar Junction, Arkansas, moves to interstate destinations, either via Collinston, Louisiana, or McGehee, Arkansas. Lumber moving via Collinston moves south from Dollar Junction to Collinston and thence north through Monroe to McGehee. The first scale is at McGehee, a distance of 111 miles from Huttig. If the lumber moves north from Dollar Junction, via Gurdon, Arkansas, and thence through Little Rock, the first scales reached are located at Gurdon, 100 miles from Huttig. If the lumber should move, as but little does move, south from Dollar Junction, to Monroe, Louisiana, the first scales are located at Monroe, a distance of 45 miles. At that point the track scales are three-fourths of a mile north of the freight yard, and the yard engine would have to take the loaded car three-fourths of a mile north to the scales and three-fourths of a mile south to the yard, where the car would be made up into a train. There would, therefore, be an additional haul at Monroe of 1½ miles in order to weigh the car. (Rec., 18.)

Section 1 of the Interstate Commerce Act provides that the term "railroad" shall include all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease, and

also all switches, spurs, tracks, terminals and terminal facilities of every kind, used or necessary in the transportation of property. The term "transportation" includes locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract for the use thereof, and all services in connection with the receipt, delivery and elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. Clearly under these statutory definitions all of the track over which the car of lumber is handled, regardless of who owns the track, is part of the railroad to be included in the distance upon which any mileage scale of rates must be applied. Likewise, all of the instrumentalities, including the scales and all the services including that of weighing the carload, are included in the term "transportation."

In the decision of the Commission "*In re Weighing of Freight by carrier,*" *supra,* the Commission exhaustively covered the field of practices of carriers in the location and operation of track scales and found that the fundamental basis for determining the revenues of the carriers lay in obtaining correct weights. The weight of an article transported and the rate of freight per hundred pounds or per ton, determine the amount paid by the shipper. An error in either of these two factors reflects itself in the total charges. Clearly, therefore, the weighing of freight is just as much a practice subject to the Interstate Commerce Act as is the fixing of the freight rate.

In a later case, *Detroit Coal Exchange* v. *Michigan Central,* 38 I. C. C. 79, at page 84, the Commission held that the haul to and from the track scales is properly to be included in the total distance for which the carrier is entitled to compensation, the Commission there saying:

> "The several short operations which are necessary to take a car to and from the scale constitute one complete service, just as the several operations necessary to move a car from one industry to another constitute one complete service. The weighing operation is merely one link in the weighing movement, and is not unlike a number of individual operations incident to the average switching movement."

Thus the Commission by formal decision has held that the transportation of freight to and from track scales should be performed by the originating carrier, and that such haul is part of the service for which the carrier is entitled to compensation. But when the Commission came to apply the rule to appellant it declined to grant compensation for the movement to and from the track scales.

The tap line record showed that of 103 tap lines under investigation, 20 weighed outbound lumber, and 13 had no scales available; as to the remaining 70 tap lines the record is silent. Your petitioner, therefore, is singled out from all other common carriers. An arbitrary ruling is applied without any justification whatever.

By its own rulings, decisions and opinions the Commission has convicted itself of arbitrary action in the present case. In the absence of evidence that the Missouri Pacific should weigh the lumber, with the evidence clearly showing that for many years prior to the Tap Line decision the appellant had performed the service, with the Commission in its weighing investigation finding that the inital carrier should weigh the freight, it cannot be denied that the action of the Commission in this case not only was not based on evidence, but was contrary to the evidence and arbitrary.

The District Court erred:

III. In finding and deciding that the Commission interpreted and applied its order of June 29, 1914, 40 *I. C. C.*, 470, *which established the basis of tap line charges "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point."*

The opinion of the court quotes from the decision of the Commission, 40 I. C. C., 470, in which it is stated that the appellant, in order to bring about an increase in its earnings, claims to be entitled to compensation "for an out-of-line haul to the scale track of nearly a mile." We have already shown that the total movement from the switch point of the scale track to the scale and return is only 840 feet and to the new location and return only 1,808 feet. This distance is far short of "nearly a mile." The statement of the Commission is obviously extravagant. The quotation in the opinion of the court below that the allowance had been "fixed by the Commission for the distance covered by the direct movement from the mill to the junction" (Rec., 45), can not furnish a basis for a finding that the haul to the scales for weighing is "not made necessary to safely and properly reach such junction point." We have seen that the Commission's order definitely prescribes a mileage scale of divisions or allowances for switching services "from points on the line * * * a distance of one mile or less from the junction." Nothing has been said by the Commission in any opinion or order in the Tap Line cases which in any way provided that the haul should be computed via any particular line of track. The Interstate Commerce Act defines "transportation" as including weighing. The Commission, in its decision in *Detroit Coal Exchange* v. *Mich-*

igan Central, supra, has definitely stated that a carrier is entitled to compensation for the weighing, including the necessary switching to the scales of carload freight.

The District Court, therefore, was in error in its finding that the Commission had interpreted and applied its order establishing the Tap Line charges as contemplating "a direct haul from the loading point to the junction point, without any diversion not made necessary to safely and properly reach such junction point." In any event, "properly to reach such junction point" contemplates that the car, with its load of lumber, should be delivered at the junction point accompanied by such papers and such information as will enable the connecting carrier, the Missouri Pacific, to transport the freight to its final destination and to collect the charges. The Interstate Commerce Act deals primarily with charges for transportation or compensation to be paid by the shipper to the carrier. That compensation depends as much on the weight of the car as on the rate per hundred pounds. The tariff on file with the Commission shows the rate. The weighing of the carload is the only manner in which the other factor can be ascertained. It is, therefore, essential to the proper delivery of the car to the connecting line that the information as to the weight be furnished to the connecting carrier.

The District Court erred:

V. *In finding no error of fact in the findings of the Commission complained of in the petition, nor any misapplication of law thereon.*

Under the four assignments already discussed, we have shown that the Commission has arbitrarily denied appellant compensation for the transportation from switch point at "D" to the scales at "E" and return to "D,"

The total service performed by the appellant in weighing the lumber is not limited to hauling the car 840 feet to and from the former location of the scales at "E," or 1,808 feet to and from the present location of the scales, but includes as well the service of weighing the car after it is placed on the scales. This weighing service is performed by an employe of the appellant, who is a sworn weigh-master, under the jurisdiction of the Western Weighing and Inspection Bureau. Weighing is one of the services included in the term "transportation" which it is the duty of the appellant under Section 1 of the Interstate Commerce Act to furnish upon reasonable request. Denial of compensation for this service is therefore an arbitrary act on the part of the Commission and one beyond its authority to enforce.

This court has frequently considered cases involving the validity of orders of the Commission. Appellant does not question that if a complaint is made to the Commission, or if an investigation has been instituted by the Commission concerning the reasonableness of the division of the joint through interstate rate, that body has authority to examine the subject, and if it finds the division complained of is in and of itself unreasonable, having regard to the services rendered, to fix a new and reasonable division. Appellant does not deny that where the Commission exercises such authority upon a full record its finding is not subject to review by the court.

Interstate Commerce Commission v. *Illinois Central*, 215 U. S. 452; 54 L. Ed. 280.

In other words, this appellant fully concedes that an order of the Commission made in a proceeding such as that before the Commission in the Tap Line cases, I. & S. Docket 11, is not open to attack in the courts, so long as the Commission keeps within the powers conferred by the statute. The court should set aside the order of the

Commission complained of herein, because that order is in excess of the power conferred upon the Commission. That the order was in excess of the power conferred upon the Commission is to be determined by the substance and not the mere form of the order. In other words, this court will determine whether, under all the circumstances disclosed of record, the Commission fixed not merely the reasonable division out of the joint through rate, but acted in the exercise of an authority not conferred upon it by law. The Commission acted not merely to correct an unjust division of the through rate, but made the order complained of upon the theory that the power was possessed by the Commission to set aside a division which it had found to be just and reasonable for a certain length of haul and to substitute a rate which it had found reasonable for a shorter haul. In other words, appellant charges that the action of the Commission was arbitrary and constituted an abuse of power.

In the case of *Southern Pacific Company et al.* v. *Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 263, this court considered the action of the Interstate Commerce Commission in making an order which was complained of on much the same grounds as that invoked by appellant herein. In that case, the Commission had, after a full investigation upon complaint, reduced a rate of $5 per ton for the transportation of green common rough fir lath and lumber and forest products from Willamette Valley points in Oregon to San Francisco and Bay points in California. A rate of $3.10 per ton had been in effect from about 1898 to 1907; the Commission established a rate of $3.40 a ton from certain points in the Willamette Valley and $3.65 per ton from certain other points. The case was heard upon amended bill, the answer, the replication of the plaintiffs and the evidence introduced before the

Commission. The Circuit Court entered a decree dismissing the bill upon the theory that, as the Commission found that the rate fixed by it gave some remuneration upon the cost of operation and was not, therefore, confiscatory, there was no power to interfere. The opinion by the late Chief Justice White points out that the Commission had based its decision not upon the amount of the rate which was just and reasonable for the services to be performed, but because of some doctrine of estoppel, by reason of the long continuance of the rate, the fact that lumber companies had bought their timber, built their mills and engaged in the business upon the faith of the continuance of a rate of $3.10. That this is so was shown by quotations from the transcript of record before the Commission, 55 L. Ed. 287. We quote from that decision of this court at some length, page 289:

> "Although we find the record replete with statements made during the course of the hearing by counsel for both parties, and certainly by one or more of the commissioners who were present at the hearing, which we think leave no doubt as to the nature and character of the power exerted, we do not pursue the subject further, since we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right, under the law, to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time, to a just and reasonable charge for

the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary. The obvious impression as to the nature and character of the power exerted, given by the very face of the opinion of the Commission, is shown by the syllabi to the official report of the opinion, which we copy in the margin.

Finally, the express exclusion of Portland from the benefit of the reduced rate, and the reasons given for the exclusion indubitably establish the character of the power exerted so as to exclude the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate. We say this because, if the assumption be indulged in that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding Portland from the benefit of the reduced rate. We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable rate and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory character. And the reasons given for the exclusion of Portland from the benefit of the reduction which the order made likewise leave no room for the conclusion that the reduction was based merely upon the finding that the tariff rate which was reduced was, considering the service rendered, in and of itself unreasonable."

So, in the present case, we find the Commission committing the same error of law. The Commission had already in the main Tap Line case, fixed as the maximum reasonable allowance for switching a distance over one mile and up to three miles, $3; and on movements over

three miles and not more than six miles, 1½ cents per hundred pounds.

On the haul of the non-proprietary lumber from the Wisconsin Lumber Company's mill to the scale for weighing and thence to Dollar Junction for delivery to the Iron Mountain, the Commission fixed an allowance of 1½ cents per hundred pounds, as the haul was more than three miles. But on the proprietary lumber, although actually hauled more than three miles, the Commission declined to allow 1½ cents per hundred pounds, and allowed only $3 per car. The reason given by the Commission is that it cannot include the distance hauled to and from the scales which when deducted left the haul at less than three miles. If the Commission had been proceeding to fix a just and reasonable maximum allowance for the switching preformed by this appellant, it would not have based its decision upon the sole point of whether the haul to and from the scales should be included in the distance for which compensation was to be granted. We cannot undertake to say why the Commission would deprive appellant of compensation for this haul. Suffice it to say that the Commission did deny the compensation. We assume that counsel for the Commission and for the United States will frankly admit that the action of the Commission was controlled solely by its view that appellant was not entitled to compensation for the service of moving the loaded car to and from the scales, because if the Commission had not reached this conclusion it would have included the service as being one for which the appellant was entitled to be paid. In the *Willamette Valley case, supra*, the Commission thought that the carrier was not entitled to increase the rate charged lumber shippers to what was a reasonable basis because of the promises which had been made that the rate would be maintained at $3.10. The two cases are on all-fours.

CONCLUSION.

The decree of the District Court was evidently based on the theory that the Interstate Commerce Commission is better informed as to the evil results which may follow from enjoining the order than is the court. Where, however, the action of the Commission, is so manifestly an abuse of power, is so clearly an attempt to deprive a railroad company of proper compensation for lawful transportation services, there is no room for assumption. By an arbitrary act without foundation either in fact or in law, this appellant has been deprived of compensation to which it is clearly entitled. The decree of the District Court should be reversed, with directions to enjoin and set aside the order of the Commission complained of.

Respectfully submitted,

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Of Counsel.

Sept. 17, 1921.

In Equity, No. 291.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

W. R. MCFARLAND,
For Interstate Commerce Commission.
P. J. FARRELL,
Of Counsel.

OCTOBER, 1921.

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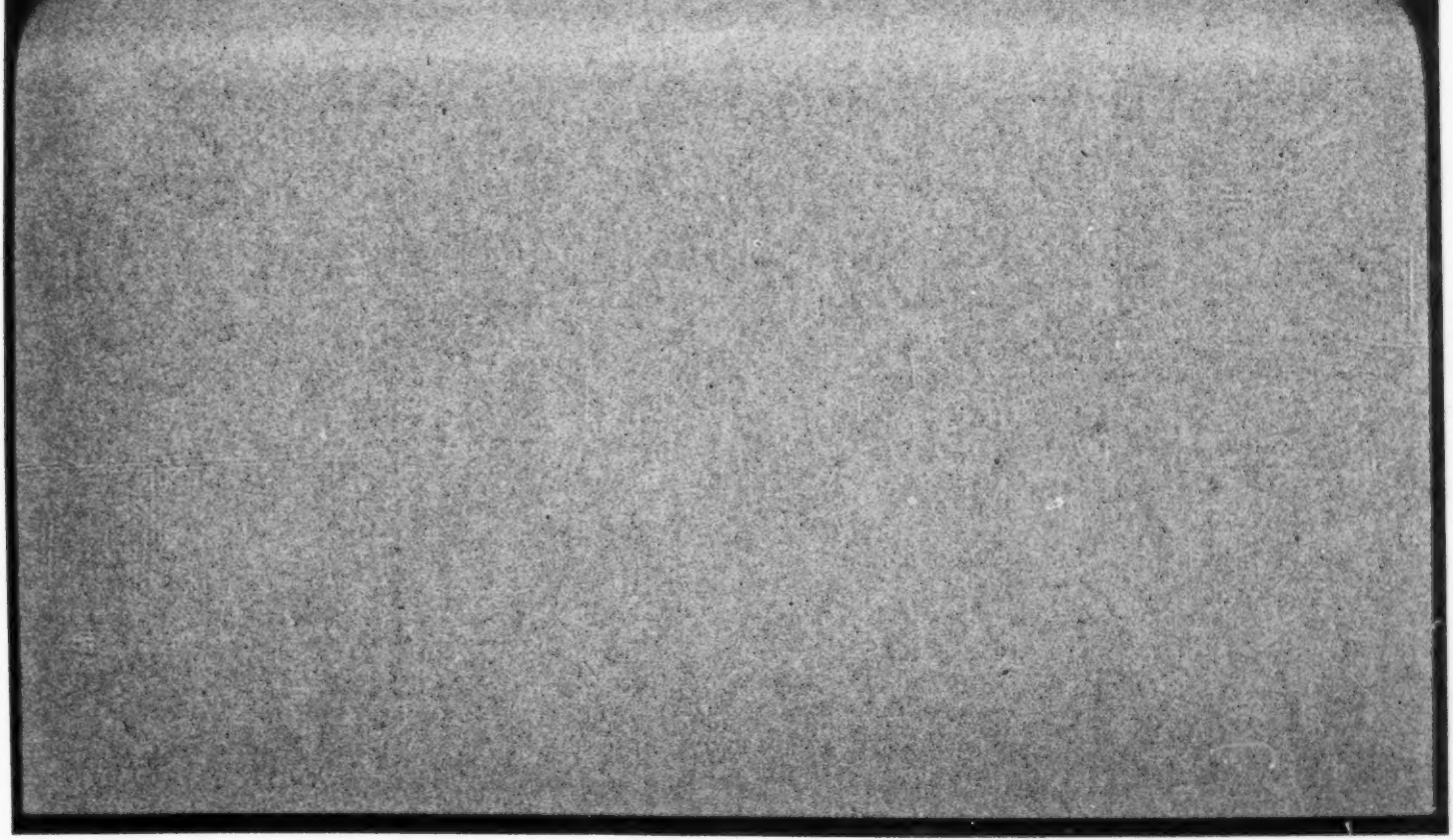

SYNOPSIS AND INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

LOUISIANA & PINE BLUFF Railway Company, appellant,
v.
THE UNITED STATES OF America and Interstate Commerce Commission, appellees.
} In Equity, No. 291.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

Appellant is a common carrier, subject to the provisions of the interstate commerce act. It owns and operates a standard gauge steam railroad extending from Huttig, Ark., to Dollar Junction, Ark., which connects at both of the points mentioned with the line of railroad of the Missouri Pacific Railway Company, successor to the St. Louis, Iron Mountain & Southern Railroad Company.

Appellant is a party to a proceeding before the Interstate Commerce Commission, hereinafter called the Commission, known as Investigation and Suspension Docket No. 11, *The Tap Line Case*. The original

report in that proceeding is *Tap Line Case*, 23 I. C. C., 277, decided April 23, 1912. On May 14, 1912, a supplemental report was made, 23 I C C., 549. In both of these reports the Commission described the various tap lines at some length, and also made certain general statements based on evidence of record regarding the tap lines as a whole. At pages 293 and 297 of the original report the Commission pointed out that each case must be considered on its own facts and "that no general rule or principle may be laid down that will do exact justice in all cases * * *." The findings of the Commission in respect of appellant appear at pages 583 to 587 of the supplemental report.

The Commission, on May 14, 1912, made an order, which was amended on October 30, 1912, designed to carry into effect the conclusions reached in the original and supplemental reports, *supra*.

Later, on July 29, 1914, the Commission made its second supplemental report in the proceeding, 31 I. C. C., 490. Among other things, it said:

> This matter comes before us again upon petitions, rehearings, and further argument, and upon the fundamental questions involved in the opinion and order relating thereto in *The Tap Line cases*, 234 U. S. 1.
>
> In our original and supplemental reports herein, 23 I. C. C., 277, 549, we found that certain of the tap lines that were parties thereto did not perform a service of transportation for their respective proprietary companies, either in the movement of the lumber of the pro-

prietary company from its mill to the trunk line, or in the movement of the logs from the forest to the mill; that this was a plant service with plant facilities; and that any allowances or divisions out of the rate on account thereof were unlawful and resulted in undue and unreasonable preferences and unjust discriminations. Other tap lines that were parties to the proceeding were recognized as performing a service of transportation with respect both to proprietary and nonproprietary traffic, and in those cases we authorized the reestablishing of through routes and joint rates, and fixed the divisions that might be paid by the connecting trunk lines to those tap lines out of the through rate. An order was issued in conformity with these findings. Later five of the tap lines, to which, as we had held, divisions could not lawfully be paid by the trunk lines, filed petitions in the Commerce Court, seeking to have the order of the Commission enjoined and annulled. The decree of that court vacated and set aside that portion of the order of the Commission wherein it was held that with respect to the product of the proprietary mills the five tap lines did not perform a service of transportation. From this order an appeal was taken to the Supreme Court of the United States.

In its opinion in the case above cited the Supreme Court held these five lines to be common carriers with respect both to proprietary and nonprietary traffic, and that the Commission had exceeded its authority in

condemning the divisions previously allowed to them out of the through rate as an attempt to evade the law and to secure rebates and preferences.

There were 57 tap lines to which, in its original and supplemental reports, the Commission refused to sanction allowances on the general grounds above stated; but although the appeal was taken to the courts on behalf of only five of these tap lines, nevertheless the rulings announced by the court extend in principle to all of them, and we have felt in duty bound to apply the rulings to the entire group.

* * * * *

With respect to each of the tap lines that are parties to this proceeding, the original orders of the Commission, and the orders subsequently entered, so far as they relate to through routes, joint rates, and divisions, will be vacated and set aside; and upon the facts of record, we conclude and find that all the through routes and joint rates in effect prior to May 1, 1912, between the trunk lines and tap lines named on the record should be restored and reestablished, and that the divisions out of the through rate on interstate shipments of lumber and forest products, from points on such of these tap lines as file tariffs and have otherwise complied with our accounting rules, etc., should not exceed the following maximum amounts: For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than

6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 miles; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds. These divisions are the net amounts that may be paid out of the trunk line rates from the junctions, and when the rates from points on the tap line are made by the addition of an arbitrary, such arbitrary shall accrue to the tap line.

* * * * *

The trunk lines will be expected to file with the Commission a copy of their division sheet with each of their respective tap-line connections, making effective the divisions fixed herein. The division sheet should show the distance in miles from each station or shipping point to the junction with the issuing carrier, in addition to the amount of the division. The tap lines should file with the Commission a copy of their distance tariff or a table of distances from all shipping points on their respective lines to the junctions with the connecting carriers.

The third supplemental report in *The Tap Line Case*, 34 I. C. C., 116, dealt with an alleged discrimination in the rates on hardwood lumber moving to the general markets of consumption from the mill

of the Wisconsin Lumber Company at Huttig, Ark., on appellant's rails. In the course of its opinion the Commission said:

> Without going into details of the various rate readjustments that have been made, it will suffice to say that at the time of the hearing the rates on hardwood lumber from the mill of the Wisconsin Lumber Company, on the rails of the Louisiana & Pine Bluff at Huttig, were 3 cents higher than the rates on hardwood lumber originating on the rails of the Iron Mountain at Huttig. In tariffs issued subsequent to the hearing the Iron Mountain named rates on hardwood from the mill of the Wisconsin Lumber Company on the rails of the Louisiana & Pine Bluff at Huttig 1½ cents higher than the rates on hardwood originating on its own rails at Huttig, while the rates on pine lumber from the mill of the Union Saw Mill Company at Huttig, which is owned by the interests that own the Louisiana & Pine Bluff Railway, were the same as the rates on pine lumber originating on the Iron Mountain's own rails at Huttig. The higher rates charged on hardwood lumber were made by the addition of an arbitrary of 1½ cents to the Iron Mountain rates from Huttig, and this arbitrary, together with a division of 1½ cents out of the Iron Mountain rate, accrues to the Louisiana & Pine Bluff. The rate on the products of the complainant's mill was thus advanced, while the products of the proprietary mill at the same point move out upon the trunk line rate from the junction. Under the

> orders heretofore entered in this proceeding the proprietary company, through its tap line, can not properly receive any allowance in excess of $2 or $3 a car from the Iron Mountain, nevertheless on the products of the complainant's mill the tap line earnings aggregate 3 cents per 100 pounds.
>
> * * * * *
>
> Upon the whole record we therefore conclude and find that the published interstate rates on hardwood lumber applying from the mill of the complainant are and for the future will be unreasonable and unjustly discriminatory, in so far as they exceed the rates contemporaneously maintained on hardwood lumber originating on the rails of the St. Louis, Iron Mountain & Southern Railway Company at Huttig. We also conclude and find that the complainant has been unlawfully damaged by the Iron Mountain and the Louisiana & Pine Bluff to the extent that the through charges assessed on the products of its mill moving since May 1, 1912, have exceeded the junction point rate on hardwood.

On July 5, 1916, the Commission made a further report in Investigation and Suspension Docket No. 11, entitled *Louisiana & Pine Bluff Divisions*, 40 I. C. C., 470. After referring to the report in 34 I. C. C., 116, *supra*, the Commission said:

> A petition for rehearing filed by the Pine Bluff was granted, and the several questions raised thereon, as well as in the answer of the Wisconsin company, are now before us for consideration.

In our second supplemental report in *The Tap Line Case*, 31 I. C. C., 490, we revised the views announced in the original proceeding, thus conforming our own course in these matters to the rulings of the Supreme Court in *The Tap Line Cases*, 234 U. S., 1; and after a very careful study of the question we there fixed switching allowances and divisions for general application in this southwestern territory. For a haul of 3 miles or less under our order in that proceeding, which order is still in force throughout the territory, a tap line may receive a maximum allowance of $3 a car. And this is the amount which the Iron Mountain has been paying to the Pine Bluff on lumber traffic from both mills at Huttig interchanged at Dollar Junction. The Pine Bluff, however, is here asserting that its haul to that junction is in excess of 3 miles, and that under our order in the case last cited it is therefore entitled, not to a switching charge of $3 a car but to a division out of the through rate of 1½ cents per 100 pounds, or approximately $9 a car. It is important, therefore, that the distance from the two mills to Dollar Junction be accurately determined, and that, indeed, was one of the chief purposes in asking for a rehearing.

The measurements, which have been taken with care, show that the mileage actually traversed by the cars when moving between the mill of the Wisconsin company and the trunk line connection at Dollar Junction is 3.40 miles; and that between the Union plant and the same connection a car moves 3.25

miles. The mere statement of these distances, however, is not sufficient, especially in view of the facts in this case. It is shown of record that these distances include out of line or diverted movements to the track scales of 840 feet, in the case of shipments of the Wisconsin company, and of 4,380 feet, in the case of shipments from the Union mill. If these distances be deducted from the total haul the actual necessary mileage covered by the cars in direct movement to Dollar Junction is 3.24 miles from the Wisconsin mill and 2.41 miles from the Union mill. In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an out of line haul to the scale track of nearly a mile. Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction. Under the circumstances we can not lend our sanction to the demand for increased allowances to be paid to the Pine Bluff from the Union mill.

The second question to be determined is whether Huttig or Dollar Junction is the proper point of interchange between the Pine

Bluff and the Iron Mountain. The record shows that ever since the construction of the tap line the interchange of cars has taken place at Dollar Junction, the necessary and ample facilities having been provided at that point. For a short period, during which the Iron Mountain was repairing its tracks near Dollar Junction, the interchange was made at Huttig. The only tracks at the latter point available for this purpose are the scale tracks heretofore referred to, the use of which, it is said, would seriously interfere with the handling of traffic. To provide facilities now for the interchange at Huttig would necessitate an entire reconstruction of the tracks at that point, the expense of which would be considerable. From the record before us no objection is found to the present practice of interchanging the cars at Dollar Junction. When made at that point the allowance by the Iron Mountain to the Pine Bluff on cars from the mill of the Wisconsin company should not exceed 1½ cents per 100 pounds; from the Union mill the allowance should not exceed $3 a car. These are the allowances that obtain under our second supplemental report, *supra*, throughout the entire territory. Should the interchange be effected at Huttig under our order in that case the Iron Mountain may pay to the Pine Bluff $2 a car on shipments from either mill.

On April 7, 1919, following general increases in the rates on lumber charged by the Director General of Railroads, the Commission made its Fifth Sup-

plemental Order in Investigation and Suspension Docket No. 11, which provided, in part:

> *It is ordered*, That from and after June 1, 1919, the switching charges or divisions which may be paid to tap lines parties hereto by the trunk lines out of the rates on interstate shipments of lumber and forest products from points on said tap lines shall not exceed the following amounts, namely: For switching a distance of 1 mile or less from the junction, $2.50 per car; over 1 mile and up to 3 miles from the junction, $3.50 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 2 cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2½ cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 3 cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3½ cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 4 cents per 100 pounds; over 40 miles from the junction, 4½ cents per 100 pounds: *Provided*, That these divisions are to be the net amounts that may be paid out of the trunk line rates from the junction, and when the rates from points on the tap lines are made by the addition of an arbitrary, the amount of such arbitrary shall accrue to the tap line.

On June 10, 1919, the Commission made an order, including as a part thereof the report of the same date in the premises, which is the subject of the

appeal now before this court. For convenient reference, the report and order are set forth in full:

INTERSTATE COMMERCE COMMISSION.

INVESTIGATION & SUSPENSION DOCKET NO. 11.
LOUISIANA & PINE BLUFF DIVISIONS.

Submitted January 8, 1919. Decided June 10, 1919.

Upon further consideration of the issues involved the Commission adheres to the findings announced in its original report herein, 40 I. C. C., 470, but on and after June 1, 1919, the Louisiana & Pine Bluff may receive the increased divisions permitted by the fifth supplemental order in *The Tap Line Case*.

SUPPLEMENTAL REPORT OF THE COMMISSION.

EASTMAN, *Commissioner:*

In our original report in this proceeding, 40 I. C. C., 470, dealing with the question of divisions to the Louisiana & Pine Bluff Railway, it was found that the distance from the Union mill at Huttig, Ark., one of the plants served by the tap line, to the connection with the St. Louis, Iron Mountain & Southern Railway, hereinafter called the Iron Mountain, at Dollar Junction was 2.41 miles. Including an out-of-line movement from the Union mill to the track scale, the distance was 3.25 miles, but the Commission held that an out-of-line or diverted movement to a track scale may not, under the second supplemental report in *The Tap Line Case*, 31 I. C. C., 490, be included in computing the distance upon which the division that a tap line may receive is to be determined.

It was further found that the maximum division which the tap line might properly receive for services performed, as fixed in the report last above cited, should not be more than $3 per car for the movement from the Union mill to Dollar Junction. This amount being within the maxima fixed in the order of July 29, 1914, entered in connection with the second supplemental report, no further order was deemed necessary. The Louisiana & Pine Bluff, however, refused to accept this amount of $3 per car for switching from the Union mill to Dollar Junction or to make settlement on that basis for services that had been rendered during the pendency of this proceeding. Thereupon, the Missouri Pacific Railroad, successor to the Iron Mountain, filed its petition for an order to give effect to our findings. Under a rule to show cause why such order should not be entered the Louisiana & Pine Bluff petitioned for further oral argument, which was granted, and the case was reargued before the Commission.

No question is or was raised as to the correctness of the facts stated in the Commission's previous report, but it was contended that the track scales, owing to inadequate drainage and other conditions, could not be located between the Union mill and the junction; that the out-of-line haul from the Union mill to the scale and thence to the junction with the Iron Mountain, a distance, as stated, of 3.25 miles, is actually necessary in the handling of the lumber; and that the Louisiana & Pine Bluff is entitled to compensation for services based on that distance. It is denied that any device for

securing larger divisions inheres in that method of computing the distance. The track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union mill to the scales, and for part of the distance from the scales to Dollar Junction, is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

We have considered these contentions and the evidence submitted, but find no sufficient reason for modifying the findings stated in our previous report. Since that report was issued, however, the Commission has made its fifth supplemental order in *The Tap Line Case* increasing the divisions which may be received by tap lines from their respective trunk line connections 50 cents per car for switching three miles or less and one-half cent per 100 pounds on traffic hauled more than three miles. These increased divisions are made effective June 1, 1919.

We adhere to our original finding in this proceeding, with the modification that the divisions accorded the Louisiana & Pine Bluff for switching interstate shipments of lumber and forest products from the Union mill at Huttig, Ark., to Dollar Junction should not exceed $3 per car up to and including May 31, 1919, and $3.50 per car on and after June 1, 1919.

An appropriate order will be entered.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of June, A. D. 1919.

INVESTIGATION AND SUSPENSION DOCKET NO. 11. LOUISIANA & PINE BLUFF DIVISIONS.

This case being at issue and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its further findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It appearing, That on July 5, 1916, the Commission made its report in the above-entitled proceeding, 40 I. C. C., 470, which report is also hereby referred to and made a part hereof;

It further appearing, That in said report the Commission found that the respective distances from the mill of the Union Saw Mill Company and from the mill of the Wisconsin Lumber Company at Huttig, Ark., to the connection with the Missouri Pacific Railroad at Huttig, Ark., are less than 1 mile; that the distance from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 3.24 miles; and that the distance from the

mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 2.41 miles;

It is ordered, That the divisions accorded to the Louisiana & Pine Bluff Railway out of the rates on interstate shipments of lumber and forest products from mills on the rails of the Louisiana & Pine Bluff Railway at Huttig, Ark., prior to June 1, 1919, shall not exceed the maximum amounts fixed by the order of July 29, 1914, in *The Tap Line Case*, namely: For switching from the mills of the Wisconsin Lumber Company and the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Huttig, Ark., a distance of less than 1 mile, $2 per car; from the mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., a distance of 2.41 miles, $3 per car; from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., a distance of 3.24 miles, 1½ cents per 100 pounds.

It is further ordered, That the increased divisions fixed in the fifth supplemental order in *The Tap Line Case*, effective June 1, 1919, may be applied to shipments moving on and after that date.

Provided, That the allowances and divisions fixed herein shall be applied to shipments of lumber and forest products moving between May 1, 1912, and the respective dates of the divisions established in compliance with this order.

And it is further ordered, That a copy of this order be served upon the Louisiana & Pine Bluff Railway Company, the Missouri Pacific Railroad Company, and Georgia C. Hitchcock, special master in the matter of claims against the St. Louis, Iron Mountain & Southern Railway Company.

By the Commission,

[SEAL.] GEORGE B. MCGINTY,
Secretary.

Following general increases in rates pursuant to the report of the Commission in *Increased Rates, 1920*, 58 I. C. C. 220, the Commission entered, on September 8, 1920, its sixth supplemental order in Investigation and Suspension Docket No. 11 (Rec. 47), which provided, among other things:

It is ordered, That from and after the effective date of the increased rates authorized by the report of the Commission in *Increased Rates*, 1920, *supra*, the switching charges or divisions which may be paid to tap lines parties hereto by the trunk lines out of the rates on interstate shipments of lumber and forest products from points on said tap lines to the various groups defined in said report shall not exceed the following amounts, namely:

For switching a distance of 1 mile or less from the junction, $3.30 per car; over 1 mile and up to 3 miles from the junction, $4.50 per car; on shipments from points over 3 miles and not over 10 miles from the junction, 3 cents per 100 pounds; over 10 miles and not over 20 miles from the junction, 4 cents per 100 pounds; over 20 miles and not more than

> 40 miles from the junction, 5 cents per 100 pounds; over 40 miles from the junction, 6 cents per 100 pounds.

A petition was filed by the Louisiana & Pine Bluff Railway Company in the District Court of the United States, Western District of Arkansas, Texarkana Division (Rec. 1), in which it was alleged, in substance, that the Commission abused its power and acted arbitrarily in making its order of June 10, 1919, *supra*, in Investigation and Suspension Docket No. 11, *Louisiana & Pine Bluff Divisions*, and prayed that the order be set aside and its enforcement enjoined.

The Commission filed an answer (Rec. 32) and the United States a motion to dismiss and answer (Rec. 37).

Upon hearing the district court made a decree dismissing the petition or bill of complaint for want of equity (Rec. 41). A memorandum opinion was delivered (Rec. 44) in which the district court accepted the Commission's interpretation of its own order and called attention to the fact that only a portion of the evidence before the Commission was presented to the court, thus precluding a review of the Commission's findings on the ground of insufficient evidence.

The case is before the Supreme Court on appeal by the Louisiana & Pine Bluff from the above-mentioned decree.

The assignments of error (Rec. 42) allege in substance that the district court erred in accepting the Commission's interpretation (40 I. C. C. 470, 471) of its order of July 29, 1914, as contemplating a direct

haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point, and in refusing to review the Commission's findings in its report and order of June 10, 1919, *supra*.

ARGUMENT.

I. The Commission's order was made after full hearing and is based upon the entire record, which covers, in addition to appellant, numerous other tap lines operated under somewhat similar circumstances.

In the statement of the case an effort has been made to show the court the pains and thoroughness with which the Commission has dealt with Investigation and Suspension Docket No. 11. It may confidently be said that in few proceedings before the Commission have there been more elaborate investigations or a greater volume of evidence adduced than in this proceeding.

One of the principal purposes of the investigation was to eliminate unjust discrimination and undue prejudice. In order to accomplish this a broad survey of the entire field was necessary, and this was made. Not only was the situation with regard to each tap line covered by the evidence, but the Commission was able by considering the entire mass of evidence before it to weigh the merits of the various contentions made and determine what administrative action was necessary in order to prevent unjust discrimination and undue prejudice.

That it was the Commission's duty to take such administrative action is beyond question. In *Tap*

Line Cases, supra, at page 28, the Supreme Court said:

> It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as nonproprietary traffic, and as such entitled to participate in joint rates with other common carriers that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so

that a tap line shall receive just compensation only for what it actually does.

In the district court appellant set forth in its petition excerpts from the evidence which, it contended, constituted "a transcript of all the testimony before the said Commission on the point involved." The Commission did not agree with appellant's position and insisted that it had before it and considered all of the evidence introduced in Investigation and Suspension Docket No. 11. In this, as shown by the memorandum opinion of the district court, the Commission was sustained by that court. A similar situation was presented in *O'Keefe* v. *United States*, 240 U. S., 294. In the course of its opinion the Supreme Court said, page 302 et seq:

> It is insisted that there was no evidence before the Commission to sustain its finding to the effect that any allowance or division in excess of the limits prescribed would result in undue preference and unjust discrimination. This, of course, is to be tested by a consideration of the evidence that was before the Commission. The report and supplemental report of April 23 and May 14, and the orders of May 14 and October 30, 1912, and the oral evidence and main exhibits before the Commission from the beginning of the tap-line investigation to the making of the order last mentioned were offered in evidence. Appellant, however, has printed only a small part of the testimony, being that which especially relates to the Louisiana & Pacific Railway, its organization, ownership, manner and cost of

construction, operating revenue and expenses, accumulated surplus, etc. But, besides these details as to this line, the Commission had before it, as its reports show, a mass of evidence relating to numerous other tap lines, operated under somewhat similar circumstances, including evidence as to the allowances actually made to them out of the joint rate. Evidence of what was allowed on these tap lines had a tendency to show what was reasonable and therefore permissible upon other tap lines, including the Louisiana & Pacific. It is said there was no evidence to enable the Commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others. Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. It is admitted that distance is an

> element properly to be considered; but appellant insists that terminal service, the origin of traffic, etc., are more important elements. This is an administrative question. The tapline problem is exceedingly complex, and the importance of a general rule based upon simple elements easily ascertained is obvious. We are not able to say that the adoption of the mileage basis is, under the circumstances, sufficient to sustain a charge of arbitrary action.

In *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S., 117, the plaintiff had brought suit under section 16 of the act to regulate commerce, as amended, to recover certain amounts awarded to him against defendants in a reparation order made by the Commission. The principal ground of defense was "that there was not sufficient evidence before the Commission to sustain its order of reparation." The Supreme Court said, page 125:

> The transcript of the testimony taken by the Commission, as introduced in evidence in the District Court, forms the basis of the decision of the Circuit Court of Appeals that the reparation order was unsupported by evidence. But the transcript shows that important documentary evidence was introduced, and furnished the principal foundation for the findings made. This documentary evidence (except the single sheet offered for purposes of illustration) was not introduced in the District Court, in order, as stated by counsel, to "avoid introducing a number of papers that would almost fill a farm wagon."

> But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced.

II. Appellant rests its case upon general administrative rulings or expressions of the Commission, and at the same time objects to accepting the specific administrative ruling regarding its situation.

There is a certain inconsistency in appellant's position which the court has undoubtedly noticed. That is, appellant rests its case upon general administrative rulings or expressions of the Commission respecting (*a*) the maximum amounts which properly may be paid as divisions or allowances to tap lines parties to Investigation and Suspension Docket No. 11, and (*b*) the points where carload freight should be weighed; but objects to accepting the specific administrative ruling regarding its situation. It is obvious that, this being a matter necessitating the exercise of administrative discretion, the Commission's finding that this particular situation demands a certain treatment must govern to the exclusion of general findings or statements. In *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, *supra*, the Supreme Court said (p. 136), regarding administrative rulings of the Commission:

> Treating it as an administrative regulation, it of course constituted no limitation upon the jurisdiction of the Commission, * * *. In any event, the Commission had power to disregard the regulation, as in effect it did by recognizing the assignments in this case.

Appellant places great reliance upon the Commission's decision in *Detroit Coal Exchange* v. *M. C. R. R. Co.*, 38 I. C. C., 79. That case and the present one can hardly be called parallel cases in view of the fact that they relate to different commodities, different carriers, different territories, and that the *Detroit Coal Exchange case* brings in no question of excessive payments to tap lines or industrial railroads. If there is sufficient similarity to the case at bar for any argument to be predicated upon the case cited, it would seem to be one adverse to appellant's contention regarding the necessity for weighing cars at point of origin, for in the *Detroit Coal Exchange case*, *supra*, the controversy was with respect to charges for weighing and reweighing at destination inbound cars of coal.

In this connection, and as indicating the diverse conditions under which carload freight is weighed and the consequent necessity for administrative rather than judicial consideration of the problems arising in connection with such weighing, reference may be had to the decision of the Supreme Court in *Great Northern Ry. Co.* v. *Cahill*, 253 U. S., 71, in which it was said, among other things, page 73:

> It was indisputably established * * * that the universal rule on all railroads throughout the United States is to determine the weight of cattle shipped in carload lots, for the purpose of ascertaining the freight charges, not by weight taken on scales at the point of shipment, but by a track scales at or adjacent to the point of delivery * * *.

III. The determination of a reasonable maximum division or allowance for appellant is essentially an administrative question within the jurisdiction of the Commission.

Appellant apparently confuses the functions of the Commission with those of the courts. The Commission's order prescribing maximum divisions or allowances which might be paid to tap lines generally by their trunk line connections out of the through rates was sustained by the Supreme Court in *O'Keefe v. United States, supra.* The Commission has considered appellant's situation specifically and has determined the maximum amount which may be paid to it, this action being an exercise of the Commission's administrative functions. Upon a consideration of the record, and keeping in view the necessity for avoiding undue preference of the appellant and the Union Sawmill Company and undue prejudice to other tap lines and mills, the Commission found that the interchange of cars might reasonably be made at Dollar Junction, although this involved a longer haul and a larger payment to appellant than if the interchange was made at Huttig. It further found that the distance necessarily covered by a car of lumber moving from the Union mill to Dollar Junction is 2.41 miles. In other words, the Commission found that the maximum divisions which might properly be paid to appellant for the services necessarily rendered in moving a car of lumber from the Union mill to Dollar Junction were $3 per car up to and including May 31, 1919, and $3.50 per car on and after June 1, 1919, and for convenience used the

scale of rates theretofore established by it and the distance of 2.41 miles. Under the Sixth Supplemental Order, *supra*, the division has been $4.50 per car from and after August 26, 1920.

The earnings per car on the divisions found reasonable by the Commission and those contended for by appellant are illustrated as follows:

	Found reasonable by Commission.	Sought by appellant, based on carload weight of 60,000 pounds.
Prior to June 1, 1919	$3.00	$9.00
On and after June 1, 1919	3.50	12.00
On and after August 26, 1920	4.50	18.00

That is, at the present time, under the Commission's orders, appellant can receive no more than $4.50 on each car of lumber and forest products moving from the Union mill north to Dollar Junction. Appellant seeks to have included in the distance a movement south to the track scale and thereby to secure greater compensation. But the Commission has held:

> The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

If appellant can persuade this court to agree with it and to substitute the judgment of the court for that of the Commission, it can greatly increase its earnings as shown in the illustration by hauling the car over the tracks of the trunk line and weighing it on the trunk line's track scale. This would, how-

ever, be contrary to the principles announced in many cases, including *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S., 452, 470; *Int. Comm. Comm.* v. *Union Pacific R. R.*, 222 U. S., 541, 547; *Procter & Gamble* v. *United States*, 225 U. S., 282, 297; *Atchison Railway Co.* v. *United States*, 232 U. S., 199, 220; *United States* v. *Louis. & Nash. R. R.*, 235 U. S., 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S., 457, 481, 488; and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S., 57, 62. These cases hold, among other things, that the courts will confine their review of administrative findings and conclusions of the Commission to determining whether there have been violations of the Constitution, a want of conformity to statutory authority, or an arbitrary exercise of authority; that is, in short, whether or not the Commission has abused the great powers conferred upon it. As was said in *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, *supra*, the court will not—

> * * * usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.
>
> Power to make the order and not the mere expediency or wisdom of having made it is the question.

What constitutes undue prejudice is a question of fact, not of law, presenting an administrative question, and this would seem equally true as to the course necessary to prevent or remove such undue

prejudice. In *Seaboard Air Line Ry. Co.* v. *United States, supra*, the court said:

> Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority.

CONCLUSION.

As appears from the statement of the case, the situation of the appellant has been the subject of four reports by the Commission. This can hardly be called denial of due process of law. The finding of the Commission is that it is necessary in moving a car of lumber or forest products from the Union mill to Dollar Junction to haul it 2.41 miles. There is nothing in the order of the Commission to require a longer haul than this; and the Commission has found that the evidence does not show the necessity for the movement of the car by appellant over the trunk line's tracks to the trunk line's track scale. On the contrary, it has said:

> Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way

> to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction.

Apparently the contention in the petition filed in the district court, that the order complained of is confiscatory, has been abandoned. In any event, it has no support in anything of record and therefore will not be discussed.

The maximum amount which may properly be paid to appellant relates to the reasonableness of rates and is peculiarly within the province of the Commission; there was substantial evidence before the Commission regarding not only the appellant but other tap lines in the same territory; and appellant has been denied no constitutional right.

It is respectfully submitted that the decree of the district court should be affirmed.

W. R. McFARLAND,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, appellant, v. UNITED STATES OF AMERICA, APPELLEE, and Interstate Commerce Commission, intervenor.	No. 291.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION.

STATEMENT AND BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appeal is from a final order or decree of the District Court dismissing the petition of appellant to enjoin the order of the Interstate Commerce Commission of June 10, 1919, fixing the switching allowances made by Missouri Pacific Railway, a trunk line, to appellant, a tap line, at Huttig, Arkansas.

Under the prior order of the Commission of July 29, 1914, fixing allowances for all tap lines (*O'Keefe, Receiver,* v. *United States,* 240 U. S. 294), appellant claimed 1.5 cents per 100 pounds from the trunk line for switching 3.25 miles in lieu of $3 per car for less than 3 miles. Part of the alleged 3.25 miles was created by an out-of-line or diverted back-haul in order to reach certain track scales maintained by the trunk line. Subsequently, February, 1915, the scales were moved and the out-of-line or diverted back-haul was increased for the further distance of 484 feet, which extended the entire movement to 3.42 miles (Tr. 9).

The Commission has persistently found against the tap line. (23 I. C. C. R. 277, 549, 583; 31 I. C. C. R. 490, 492; 34 I. C. C. R. 116; 40 I. C. C. R. 470; 53 I. C. C. R. 475; Tr. 28, 30.)

The District Court (Circuit Judge Stone and District Judges Trieber and Youmans all concurring), in a short opinion on the merits, followed *O'Keefe, Receiver,* v. *United States, supra,* and dismissed the petition on final decree, thus sustaining in all respects the order of the Commission (Tr. 45).

The tap line is owned by Union Saw Mill Company, which is subsidiary to and owned by The Frost-Johnson Lumber Company. The three companies are one in interest. The plant covers about 160 acres. The mill is at Huttig and is directly accessible to the trunk line. The lumber may be received by the latter directly from the mill. But that prac-

tice was not followed. Instead, the lumber was moved by the tap line to Dollar Junction (about 3 miles from the point where the scales formerly stood) and there delivered to the trunk line. At one time the trunk line allowed 5 cents per 100 pounds to the tap line on all cars. On May 14, 1912, the Commission filed its first report and found the arrangement "a mere device for the payment of allowances, which we hold to be unlawful." (The Tap Line Case, 23 I. C. C. R. 277, 549, 587.)

On July 29, 1914, after the decision in *The Tap Line cases*, 234 U. S. 1 (which did not include the Louisiana & Pine Bluff), the Commission struck off the order there condemned and entered the general order for all tap lines on the basis of a scale of distances with the following maxima, viz (*The Tap Line case*, 31 I. C. C. R. 490, 492): "For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds."

On January 10, 1915, the scales constructed and owned by the Iron Mountain (now Missouri Pacific)

and operated by a weighmaster under the supervision of the Western Weighing & Inspection Bureau were (Tr. 28) removed from the place "where the scales were located for several years" as "they had difficulty in keeping the water out of them" (Tr. 30). Their removal (for the distance of 484 feet) was completed some time the latter part of February, 1915 (Tr. 28). It is significant that when the Missouri Pacific moved the scales it did not select a location toward Dollar Junction, but in the opposite direction.

On July 5, 1916, the Commission specifically found that the out-of-line or diverted movement as increased by the removal of the scales may not properly be included under the order of July 29, 1914, when fixing the switching allowance or division that the tap line may receive from its trunk line connection. (*Louisiana & Pine Bluff Divisions*, 40 I. C. C. R. 470, 471.)

On rehearing, the Commission, on June 10, 1919, filed a supplemental report in which it further found: "* * * the track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union Mill to the scales and for part of the distance from the scales to Dollar Junction is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line." (*Louisiana & Pine Bluff Divisions*, 53 I. C. C. R. 475, 476.)

On final hearing the District Court accepted the interpretation of the Commission of its own order. Seeing that the court had before it but mere fragments selected by appellant of the evidence before the Commission, and that the Commission had found on the *whole* record that (Tr. 45) "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line" (53 I. C. C. R. 475, 476), the District Court held that they could not review that finding. As no misapplication of law was shown, the bill was dismissed on final decree.

II.

BRIEF.

The petition alleges that the order of June 10, 1919, based on the order of July 29, 1914, deprives appellant of its property without due process of law, and is unjustly discriminatory and unduly prejudicial, in that appellant is denied compensation for the service of transporting its carload traffic of lumber and other forest products to and from the track scales at Huttig, while other railroad companies at other places are entitled to receive compensation for similar services under similar circumstances (Tr. 12).

The finding that "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line" may well be considered in connection with the fact that the Missouri Pacific owns the scales (Tr. 28), which are located on its own tracks at a point selected by it (Tr. 30) and are operated under the jurisdiction of

the Western Weighing and Inspection Bureau by an agent of that bureau who handles the scales (Tr. 29). Even in the mere fragments of the evidence selected and printed by appellant, there are indications that the Missouri Pacific is itself using the scales for weighing traffic not originating on the tap line. When appellant's witness was asked "Who owns the scale?" he answered, "Iron Mountain owns it, except it is joint" (Tr. 28). Certain traffic is "handled in over the Iron Mountain direct" (Tr. 29).

Concededly, then, the whole case reduces itself to the narrow arrangement that Missouri Pacific has simply turned over to the tap line the privilege of handling the cars in an out-of-line or diverted back-haul to the Missouri Pacific scales, which may be reached only over Missouri Pacific tracks, only under a trackage arrangement with the Missouri Pacific. The privilege is fully exercised by the mere operation of a switch engine by the tap line. All other facilities are furnished and all other service is performed by the Missouri Pacific. Without the out-of-line or diverted back-haul privilege to the tap line, the Missouri Pacific may not increase its divisions above $3 per car. This out-of-line or diverted back-haul was a part of the old arrangement under which the trunk line paid the tap line 5 cents per 100 pounds and which the Commission once condemned *in toto* (23 I. C. C. R. 277, 549, 583). Apparently, Missouri Pacific and appellant are united on the arrangement, as the former was not made a party to the petition and has never exercised its right to intervene. More-

over, appellant alleges that the trunk line stands ready and willing to pay on the basis of 1½ cents per 100 pounds (Tr. 12) for all cars moving prior to June 1, 1919, and 2 cents per 100 pounds for all cars moving subsequent to that date.

The appellant is driven to the extreme of arguing that the position persistently maintained by the Commission and sustained by the District Court should be overthrown by this court, holding that the order of July 29, 1914, fixing maxima allowances for switching should not be construed "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point" (Br. 13), but should also be extended to all diverted, out-of-line, back, and circuitous hauls. Protected by such a holding, the appellant tap line and the trunk line could then readily again move the scales for a farther distance away from Dollar Junction sufficient to enable the tap line to claim 4 cents per 100 pounds. There would doubtless also soon spring up a heavy demand for, and relocation of, track scales, and other facilities, throughout the whole of the tap line region.

That the Commission protected its order of July 29, 1914, against such contraptions is very clear from its language (40 I. C. C. R. 470, 471):

> In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an out-of-line haul to the scale track of nearly a mile. Were we to lend our approval to any such

> arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction. Under the circumstances we can not lend our sanction to the demand for increased allowances to be paid to the Pine Bluff from the Union mill.

Counsel complain that "on the haul of the non-proprietary lumber from the Wisconsin Lumber Company's mill to the scale for weighing and thence to Dollar Junction for delivery to the Iron Mountain, the Commission fixed an allowance of 1½ cents per hundred pounds, as the haul was more than three miles. But on the proprietary lumber, although actually hauled more than three miles, the Commission declined to allow 1½ cents per hundred pounds, and allowed only $3 per car. The reason given by the Commission is that it can not include the distance hauled to and from the scales which when deducted left the haul at less than three miles" (Br. 19).

Counsel overlook that when the Commission, by its order of June 10, 1919 (Tr. 7), found that "the respective distances from the mill of the Union Saw Mill Company and from the mill of the Wisconsin Lumber Company at Huttig, Ark., to the connection

with the Missouri Pacific Railroad at Huttig, Ark., are less than 1 mile; that the distance from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 3.24 miles; and that the distance from the mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 2.41 miles," the Commission in each instance excluded the diverted or out-of-line back-haul to the scales. So excluding it, the distance from the Wisconsin Lumber Company mill to Dollar Junction is over 3 miles, and the distance from Union Saw Mill to Dollar Junction is less. Tracing the diagram, the distance from A to B is 1,563 feet, A to C, 2,748 feet, and A to F, 17,112 feet, or 3.24 miles; whereas, the distance from G to H is 855 feet, and G to F, 12,699 feet, or 2.41 miles.

Counsel emphasize that "The tap line record showed that of 103 tap lines under investigation, 20 weighed outbound lumber, and 13 had no scales available; as to the remaining 70 tap lines the record is silent. Your petitioner, therefore, is singled out from all other common carriers. An arbitrary ruling is applied without any justification whatever" (Br. 12). So, also, is the tap line record silent, nor does it otherwise appear, that in any other known case the scales were located and the weighing was conducted under the unique circumstances disclosed here.

Counsel argue that the decree of the District Court dismissing the petition was evidently based on the theory that the Commission "is better informed as

to the evil results which may follow from enjoining the order than is the court." (Br. 20.) The learned District Court did no more than cite the language of this court in *O'Keefe, Receiver*, v. *United States* (240 U. S. 294, 303), viz: "A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others." (Tr. 45.) Of course that does not mean that the device was obvious to no one but the Commission. A more reasonable interpretation is that the District Court was politely pointing out that the device was obvious to all except counsel for the appellant.

Counsel rest on *Southern Pacific Co.* v. *Interstate Commerce Commission* (219 U. S. 433, 452). The substratum of that opinion is that the Commission was without power to disregard the question of the reasonableness of the rate and to proceed "upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers" (p. 441). If any question of the misapplication of the doctrine of equitable estoppel is presented by this record, the counsel for the appellant have not told us what it is.

In *Armour Packing Co.* v. *United States* (209 U. S. 56, 71), the language of this court is far more appropriate and under it the appellant's case must fall; viz:

> * * * it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc.

The decree of the District Court should be affirmed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

OCTOBER 1, 1921.

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LOUISIANA & PINE BLUFF RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 291. Argued October 14, 1921.—Decided November 7, 1921.

1. In a suit to set aside an order of the Interstate Commerce Commission, a claim that the order was unsupported by evidence can not be considered if only part of the evidence taken before the Commission is introduced in the suit. P. 116.
2. One of numerous lumber tap lines whose allowances, under joint rates and through routes with trunk lines, were fixed by the Commission with reference to length of tap-line haul, added to its haul a preliminary out-of-line movement to a scales, where it weighed the shipments. The Commission, finding no necessity for weighing by the tap line rather than by the trunk line, and that an increase of allowance based on such out-of-line haul would result in discrimination unjust to other tap lines and open the way for relocation of scales by other tap lines and increases of allowances amounting to rebates, refused to allow the out-of-line haul to be considered. *Held*, that its order was not arbitrary or unreasonable. P. 117.

274 Fed. 372, affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission.

Mr. Luther M. Walter, with whom *Mr. John S. Burchmore* was on the brief, for appellant.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. W. R. McFarland, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Louisiana & Pine Bluff Railway Company, a common carrier owned by the Union Sawmill Company, serves it by means of a tap line which connects its mill at Huttig, Arkansas, with the Missouri Pacific Railway at Dollar Junction. The trunk line and the tap line joined in establishing through routes and joint rates from the mill to points on the trunk line and beyond. The division or allowance given to the tap line out of the joint rates was large. It was held by the Interstate Commerce Commission to amount to a rebate to the Union Sawmill Company and to discriminate unjustly against the Wisconsin Lumber Company, an independent concern also served by the tap line.[1] After proceedings before the Commission, which extended over many years, its supplemental order, entered June 10, 1919, limited the division receivable by the tap line for hauling lumber from the Union Sawmills

[1] See *The Tap Line Case*, 23 I. C. C. 277; 23 I. C. C. 549; 31 I. C. C. 490; 34 I. C. C. 116; *Louisiana & Pine Bluff Divisions*, 40 I. C. C. 470; 53 I. C. C. 475.

to Dollar Junction to $3 per car.[1] The Louisiana & Pine Bluff Railway Company then brought this suit in the Federal District Court for Western Arkansas against the United States to enjoin enforcement of the order and to annul the same. The bill charged that the order deprived plaintiff of property without due process of law; that it discriminated against plaintiff by denying to it the same compensation which other carriers were allowed to charge for like service; and that the Commission was without authority in law or fact to make the order complained of. The Interstate Commerce Commission intervened. Answers setting forth the proceedings taken were filed; and, by consent of parties, the case was submitted for final hearing upon the pleadings. The District Court entered a decree dismissing the bill, and the case comes here on appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

No claim is made here that the division allowed is so low as to be confiscatory. No claim is made that there was lack of notice or of opportunity to be heard before the Commission or that the proceedings before it were otherwise irregular. Nor could a claim that the order was unsupported by evidence be insisted upon. For only a part of the evidence taken before the Commission was introduced. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 125. The claim now urged is that the order was arbitrary and so unreasonable that it should be set aside.

After the decision in *The Tap Line Cases*, 234 U. S. 1, the Commission made, in respect to each of the many tap line

[1] By the fifth supplemental order the maximum division for shipments after May 31, 1919, was raised to $3.50 per car; and a further increase to $4.50 per car was made by the sixth supplemental order. *Increased Rates*, 58 I. C. C. 220. Corresponding increases were made for hauls greater than three miles. These increases do not affect the legal questions involved.

companies which were party to the proceeding, an order, 40 I. C. C. 470, like that sustained in *O'Keefe* v. *United States*, 240 U. S. 294. By these orders the maximum division to a tap line for hauling a car from the mill to the junction with the trunk line for a distance of not more than three miles was fixed at $3. For a distance over three and not more than six miles the division to the tap line was fixed at 1½ cents per 100 pounds or approximately $9 a car. The plaintiff contends that it should be allowed to receive the division of 1½ cents per 100 pounds on the ground that its haul from the Union Sawmill plants to Dollar Junction was longer than three miles. Cars loaded with lumber at the platforms of the Union Sawmills, if hauled direct to Dollar Junction, would travel only 2.41 miles. But they are not hauled direct to the junction; they are taken first in the opposite direction to a track scale located on and controlled by the trunk line. Because of this fact the distance actually traveled is 3.42 miles. The Commission, interpreting its own order, directed that for this service the plaintiff could not be allowed by the trunk line more than $3. The contention is that weighing the car is an integral part of the transportation service, *In re Weighing of Freight by Carrier*, 28 I. C. C. 7; *Detroit Coal Exchange* v. *Michigan Central R. R. Co.*, 38 I. C. C. 79; and that to refuse to make an allowance for the out-of-line haul is arbitrary and so unreasonable as to invalidate the order. For the haul from the Wisconsin Lumber Company's mill to Dollar Junction, which is 3.24 miles in the direct line, the Commission authorized the division to the plaintiff of 1½ cents per 100 pounds.

The contention that the order is invalid ignores both the nature of the proceeding before the Commission and the findings upon which the order was made. The proceeding was one to remove unjust discrimination. The Commission's decision is based upon a consideration both

of general conditions and of the particular situation. It finds that allowance of more than $3 a car for hauling the car from the Union Sawmill plant to Dollar Junction would result in unjust discrimination. That the finding was supported by evidence we must assume in this proceeding. And not only does plaintiff fail to show that the conclusion reached was arbitrary; but additional findings in the report afford abundant reason why the out-of-line haul to the scales should not be allowed for in fixing the division. The Commission finds, 53 I. C. C. 475, 476, that: "The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line;" and, 40 I. C. C. 470, 471, that allowing the larger division on these facts would place the plaintiff in a more advantageous position than any other tap line in that territory performing a similar service and would "open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction." In other words, divisions that would operate as rebates.

Affirmed.